84

Item Fifth

It is my will and desire that all gifts and bequests of my common capital stock in R. J. Reynolds Tobacco Company, made in this my last Will and Testament, are upon condition that such stock shall not be sold by anyone who shall receive it, during the life of any of the trusts herein created for the benefit of my wife and children, at a price less than that which will represent a 10 percent investment, based on the average net profits of R. J. Reynolds Tobacco Company for the three fiscal years next preceding the date of sale, as may appear from the books of the Company at the close of business for these years.

Item Sixth

It is my will and desire that my wife, Katharine Smith Reynolds, during her life, and, after her death, my brother, W. N. Reynolds, shall vote my common capital stock in R. J. Reynolds Tobacco Company, left in trust herein, and my Trustee is hereby directed, from time to time, to execute and deliver the necessary authority for that purpose.

Item Seventh

I hereby nominate, constitute, and appoint my wife, Katharine Smith Reynolds, Executrix hereunder of that portion of my estate, which may be situate in North Carolina at the time of my death, and I direct that she shall be exempt from the necessity of giving bond as such and that she be not required to file in the Clerk's Office any inventory or account, but in lieu thereof file with the Safe Deposit & Trust Company an inventory and account, under oath, of the amount of property received by her, and of her disbursements, including distributions made by her of my estate there situate, furnishing therewith, if required, proper vouchers covering all payments.

As soon after my death as convenient, I direct my said
85 Executrix to pass over, transfer, and deliver any of my estate located in the State of North Carolina to those who are entitled to the same under the provisions of this Will, turning over to said Safe Deposit & Trust Company of Baltimore, Trustee, the portion of my estate for the benefit of my said children.

I hereby nominate, constitute, and appoint the Safe Deposit & Trust Company of Baltimore, Executor hereunder of all my estate outside of the State of North Carolina, and I direct it to take into custody all of my said estate (except that located in the State of North Carolina) and to make distribution thereof

to the devisees hereunder direct according to the provisions of this Will, and I confer upon my said Executrix and Executor respectively, full power and authority to do and perform all acts necessary to enable them to settle my estate and make effective and carry out the provisions of this Will.

Item Eighth

I hereby provide that all payments to be made hereunder to my beneficiaries shall be into their own hands and not into the hands of others, whether claiming by their authority or otherwise.

Item Ninth

I direct my said Executor hereinbefore named to pay out of the residue of my estate all collateral and succession tax which may be payable on any legacy, devise, or bequest under this Will.

Item Tenth

In full payment and compensation for all the duties and services performed by my Executrix and Executor and the Safe Deposit & Trust Company of Baltimore, as Trustee, under this Will, I make the following provision: that my Executrix and Executor shall be paid a commission of 2 percent (2%) upon the value of my estate passing into their possession; and to the Safe
86 Deposit & Trust Company of Baltimore, Trustee, mentioned in this Will, there shall be allowed a commission of 5 percent (5%) on the income collected and disbursed by it; and that, in no event, shall there be any other charge made against my estate, either by said Executrix or Executor, or by the Safe Deposit & Trust Company of Baltimore, as Trustee. The acceptance of Executorship and Trusteeship under this Will shall be considered as acceptance of the provisions of this Will as to compensation and otherwise.

Item Eleventh

I hereby direct, authorize, and empower my wife, Katharine S. Reynolds, and my brother, William N. Reynolds, or the survivor of them, from time to time to appoint, or substitute, a new Trustee, or Trustees, of this my last Will and Testament, if my Trustee herein appointed, or if its successor, or successors, shall refuse to serve, cease to exist, become incapacitated, or resign, or, if in the judgment of my wife and brother, or in the judgment of the survivor of them, it shall be for the best interest of

my estate to substitute and appoint another or other Trustees in the place of the then Trustee, or Trustees. The appointment or substitution above provided for shall be made by a written instrument, under seal, duly acknowledged and recorded and filed with the proper keeper of records where required to be filed. Thereupon, and so often as any new Trustee, or Trustees, shall be substituted or appointed, as aforesaid, all the property, real, personal, and mixed of every nature and kind whatsoever and wheresoever situated, which shall be held upon the trusts herein created, shall be conveyed, assigned, and transferred, respectively, in such manner that the same shall become legally and effectually vested in the new Trustee, or Trustees, who shall thenceforth be competent to act in the execution of the trusts herein created,
87 as fully and effectually, with all the same powers and authorities, and subject to all the conditions and restrictions, to all intents and purposes whatsoever, as if originally appointed herein.

Item Twelfth

I hereby expressly revoke all Wills heretofore at any time made by me.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal this 25th day of July, 1917.

R. J. Reynolds. [SEAL]

Signed, Sealed, Published, and Declared by Richard Joshua Reynolds, the above named Testator, as and for his last Will and Testament in the presence of us, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto.

D. Rich,
Geo. W. Orr,
H. H. Shelton.

88 *Will of Katharine Smith Johnston*

I, Katharine Smith Johnston, of Reynolda, Forsyth County, North Carolina, do make, publish, and declare the following to be my last Will and Testament, hereby expressly revoking all Wills heretofore made by me.

Item 1

I direct my Executors hereinafter named to collect all
89 debts and obligations owing to me, and to pay all my just debts.

Item 2

I give to my husband, J. Edward Johnston, all the jewels which he has given me, a diamond engagement ring, the string of pearls, diamond bar pin (wedding present), emerald jade diamond ring, and our wedding ring. If our baby should be a girl and live, I should like him to save them as my gift to her; or if a boy, that he should save our engagement and wedding ring for him.

Item 3

I give to George W. Orr, if in my employ at the time of my death, the sum of Ten Thousand Dollars ($10,000).

I give to A. C. Wharton, if in my employ at the time of my death, the sum of Ten Thousand Dollars ($10,000).

I give to Blanche Gunn, if in my employ at the time of my death, the sum of Two Thousand Dollars ($2,000).

I give to Benjamin F. Bernard, Jr., if in my employ at the time of my death, the sum of Two Thousand Dollars ($2,000).

I give to Kate Wurreschke, if in my employ at the time of my death, the sum of One Thousand Dollars ($1,000).

I give to Emma Howison, if in my employ at the time of my death, the sum of Five Hundred Dollars ($500.00).

I give to each of the following faithful servants who have long been employed by me, viz:—Pluma Walker, Cleveland Williams, and John Carter, if in my employ at the time of my death; Two Hundred Dollars ($200.00) per year for a period of five years succeeding my death, making in all One Thousand Dollars
90 ($1,000) to each, provided, however, that the first payment shall be made as of the date of my death and subsequent payments shall be made each year thereafter, but only if and to such of them as are at those times in the employ of my household.

I give to each of the following faithful servants who have not been in my service so long, viz:—Almeta Easley, Mattie Duffy, Marjorie Carter, and George Greer, if in my employ at the time of my death One Hundred Dollars ($100) per year for a period of five years succeeding my death, making in all Five Hundred Dollars ($500) to each, provided, however, that the first payment shall be made as of the date of my death and the subsequent payments shall be made each year thereafter, but only if and to such of them as are at those times in the employ of my household.

Item 4

I give to the Safe Deposit & Trust Company of Baltimore such sum, in cash or securities of my estate in the discretion of the

Trustee, as will be necessary to enable it to pay the annuities hereinafter mentioned, in trust to pay the following annuities, quarterly accounting from the date of my death, and on the death of the annuitants the principal shall fall into and become part of the Rest and Residue of my estate, viz:

To my father, Zachary T. Smith, Two Thousand Dollars ($2,000) per annum.

To my mother, Mary Susan Smith, Two Thousand Dollars ($2,000) per annum.

And it is my request that my dear father and mother shall not save the annuities so payable to them but that they should use the same for their personal comfort.

To Miss Henriette van den Berg, One Thousand Dollars ($1,000) per annum.

91 Item 5

I give to Orange Presbytery for the use of the Reynolda Presbyterian Church the house and lot, the boundaries of which are known to A. C. Wharton and J. E. Ellerbee, and shall be as established by said Wharton and Ellerbee, known as "The Manse" or "Kathwood Cottage" and furnishings therein. If at any time regular religious services are discontinued and not held for a period of one year in said Church, the above property is to fall into and become part of the Rest and Residue of my estate.

Item 6

I give to the Safe Deposit & Trust Company of Baltimore (Maryland), all of my household furniture, pictures, books, silverware, ornaments, and all other contents of my home at Reynolda, all automobiles, fixtures, and equipment, etc., used in connection therewith, and all the capital stock of "Reynolda, Incorporated," in trust for the benefit and use of my husband, J. Edward Johnston, and all my children, until my youngest living child becomes twenty-one years of age, or until all the trusts created by the Will of R. J. Reynolds have expired and become inoperative, whichever shall happen last.

From the lands owned by the corporation of "Reynolda, Incorporated," I desire a tract to be known as the "Home Place" set apart and retained for the use of my husband and children as above. This tract is to be in accordance with the plan approved by Thomas W. Sears, of Philadelphia, Pennsylvania, a plat of which is hereto attached. The balance of the property of the corporation of "Reynolda, Incorporated," may be sold by said

Trustee, as and when, in its judgment, it may be to the best interest of the corporation to do so.

The "Home Place" shall continue to be kept for the home
92 of my husband and my children as herein provided, to wit:
All of my children and my husband can live in said premises until the expiration of the trust as above limited. If any child or my husband marry, he or she cannot bring his wife or her husband to live in said home without the consent of all the other adults living in the home and the consent of the Guardians of any minor child, and such wife or husband, and children of such marriage, may remain only as long as they have the consent of those living at the "Home Place."

The cost of maintenance of the above residence and the corporation of "Reynolda, Incorporated," over and above the income of "Reynolda, Incorporated," shall be paid by those occupying the said property on a per capita basis, and my Trustee is authorized to use as much of the income from the trust shares as is necessary to pay the pro rata shares of any of my children, and should the income from "Reynolda, Incorporated," be more than sufficient for the cost of such maintenance then the same shall be accumulated and invested as part of the trust fund.

At the expiration of the trust as above limited or at any time prior thereto should my said husband and all of my children no longer desire to live in the "Home Place" then my said Trustee is empowered to cause said "Home Place," together with, or without, any part or all of my household furniture, pictures, books, silverware, ornaments, and all other contents of my home at Reynolda, automobiles, fixtures, equipment and all live stock, and farm implements, used in connection therewith, to be sold; and should my husband or any of my children at such time desire to purchase, my Trustee shall cause the same to be sold to my husband or such child or children for such sum as shall be deemed fair and reasonable by my said husband, my said Trustee, my adult chil-
dren, and the Guardians of my minor children. The pro-
93 ceeds of sale shall be paid into the treasury of Reynolda, Incorporated." In the event that two or more of them wish to purchase the same shall be sold to the highest bidder, the bids to be sealed and opened at the same time.

I regard it as being to the best interest of the members of my family, and so it is my wish, that all of the Class A Common Stock of the R. J. Reynolds Tobacco Company which has come or shall come into the possession of my husband and my children, either from my estate, or from the estate of R. J. Reynolds, or from the estate of W. R. Reynolds, or from a trust estate created by me in Deed to the Safe Deposit & Trust Company of Baltimore as Trus-

tee dated December 29th, 1923, should be retained by them respectively until the termination of the trust provided in this Item of my Will as to "Reynolda, Incorporated," viz: either by expiration of the trusts under the will of the said R. J. Reynolds or upon the arrival of my youngest living child at the age of twenty-one years, whichever is last to happen, and at the termination of these trusts as to "Reynolda, Incorporated," I direct my said Trustee thereof to divide the assets then in its hands among such of my husband, children, and descendants as are then living, per stirpes and not per capita, and who have not disregarded my wishes by disposing of any such stock, except that my said husband or any of my children may sell such stock so received by them as follows:

1. Any thereof may sell his or her such stock to any of the others; the purchaser, however, to hold said stock on the same conditions.

2. That any thereof may sell his or her such stock to any person whatsoever when the R. J. Reynolds Tobacco Company Class A Common Stock bequeathed under the Will of R. J. Reynolds shall be sold under the terms of his Will.

94 3. That any thereof may sell his or her such stock to any person whatsoever after the trusts under the Will of R. J. Reynolds shall have expired and become inoperative.

My Trustee is authorized to accept as evidence of compliance with my wishes in this respect the transfer records of the R. J. Reynolds Tobacco Company, and if these records should be incomplete or unsatisfactory to the Trustee it is authorized to accept the affidavits of those claiming to be entitled.

Item 7

All the Rest, Residue, and Remainder of my estate, and also the estate in the hands of the Safe Deposit & Trust Company of Baltimore, as Trustee under the Will of my deceased husband, Richard Joshua Reynolds, over which I have power of appointment, I give, devise, and bequeath to the said Safe Deposit & Trust Company of Baltimore, in trust to divide the same in equal shares among such of my children and husband as survive me, my husband to take a share equal to that of a surviving child.

My said Trustee shall at once transfer and deliver the share herein given to my said husband, if he survives me, to be held by him in fee, absolutely free of any trust.

My said Trustee shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among of hold the same for such person or persons, objects or purposes, in trust or otherwise, as such child shall by its Last Will nominate and appoint to take the same, and in default of such appointment shall distribute,

transfer, and deliver the same to the descendants of such child living at its death, per stirpes and not per capita, and in default of such appointment and in default of descendants of such
95 child my said Trustee shall at its death divide and distribute the same among such of my husband, children, and descendants as are then living, per stirpes and not per capita, my said husband, if then living, shall take a share equal to that of a surviving child, but the shares of such of my children as are then living shall be held by said Trustee for them and upon the same trusts that their original shares of my estate are then held.

Provided, however, notwithstanding anything herein to the contrary that if I shall leave surviving any child by my present husband that such child's trust share shall be set aside entirely from my own absolute estate (no part thereof to be taken from the share of the estate of R. J. Reynolds over which I have power of appointment) but such share shall be equal in value to the share of each of my other children and my husband.

Should, however, any of my children die before the trusts under the Will of R. J. Reynolds have expired or become inoperative, leaving children or appointees entitled to its share of my estate, then my said Trustee shall retain in its hands until that time in trust for those entitled to receive the same all shares of Class A Common Stock of the R. J. Reynolds Tobacco Company as may then be in its hand as such Trustee.

Until each child becomes twenty-one years of age my said Trustee shall pay to its Guardians such portion of its income as they shall demand for the support and education of such child, and said Trustee during that time is further authorized and directed to pay to such Guardians from time to time upon their demand from the income of such child such an amount as shall not exceed ten percent (10%) of such child's annual income, to be used by such Guardians for charitable or religious purposes, and from and after such child attains twenty-one years of age and until it reaches twenty-eight years of age, said Trustee
96 shall accumulate and invest the income of such child as part of the corpus of its trust share, provided, however, that said Trustee is during that time authorized to pay to such child or apply for its benefit such portion or portions of said income as it may believe to be to the best interest of such child, and said Trustee shall from and after such child becomes twenty-eight years of age pay all of the income to such child.

Item 8

I hereby confer upon the Safe Deposit & Trust Company of Baltimore, my Trustee, full power to sell any part of my estate,

real or personal; provided, however, that said Trustee shall not sell any of my Class A Common Stock of the R. J. Reynolds Tobacco Company, except as follows:

1. That the Trustee may with the consent of the Guardians of any child, or, if such child is twenty-one years of age, with its own consent, sell or otherwise dispose of the Common Stock held for such child to it or to any other of my children, or to my husband.

2. That the Trustee may sell or otherwise dispose of any of its holdings of Common Stock if and whenever said Common Stock bequeathed in trust under the Will of R. J. Reynolds shall be sold under the terms provided in his said Will.

3. That the Trustee may sell or otherwise dispose of any of its holdings of said Common Stock which may be remaining in said trust after the trusts created under the Will of R. J. Reynolds shall have become inoperative.

And I hereby authorize the Safe Deposit & Trust Company of Baltimore, my Trustee hereunder, to make all necessary transfers and conveyances without any obligation on the part of the purchasers thereof to see to the application of the purchase money, and also full power to invest the Trust Estate and reinvest and change investments of the Trust Estate from time to time in its discretion; provided, however, that during the life of my said husband, J. Edward Johnston, no sale or change of investment shall be made without his approval. I hereby direct that should my said husband die pending the execution of these trusts, that thereafter the Trustee hereunder may sell, invest, and change the investments of the Trust Estate in its discretion, and I especially authorize it to invest in such proportion of any new issue or issues of stocks or bonds of the R. J. Reynolds Tobacco Company as my said Trustee's holdings may entitle it to take under the rights of stockholders to subscribe therefor; and in addition thereto my Trustee is authorized to purchase Common Stock of the R. J. Reynolds Tobacco Company as it may deem to the interest of the estate.

Item 9

I hereby direct that all stock dividends received by my Trustee shall belong to the corpus of the Trust Estates.

Item 10

It is my Will that my husband shall during his life, and after his death my brother-in-law, W. N. Reynolds, shall vote the Common Capital Stock of the R. J. Reynolds Tobacco Company left

in trust herein, and my said Trustee is hereby directed from time to time to execute and deliver the necessary authority for that purpose.

Item 11

I hereby direct that my said Trustee shall be allowed for its services a commission of not over two and one-half (2½%)
98 percent on the income by it collected and that in no event shall there be made by it any other charge as Trustee.

Item 12

I hereby authorize and empower my husband J. Edward Johnston from time to time, to appoint or substitute, a new Trustee, or Trustees, under this my Last Will and Testament, if my Trustee herein appointed, or if its successor or successors, shall refuse to serve, cease to exist, become incapacitated, or resign; or, if, in the judgment of my husband, J. Edward Johnston, it shall be for the best interest of my estate to substitute and appoint another or other Trustees in the place of the then Trustee or Trustees. The appointment or substitution above provided for shall be made by a written instrument, under seal, duly acknowledged, and recorded and filed with the proper keeper of records where required to be filed. Thereupon, and so often as any new Trustee, or Trustees, shall be substituted or appointed as aforesaid, all the property, real, personal, and mixed, of every nature and kind whatsoever, and wheresoever situated, which shall be held upon the trusts herein created, shall be conveyed, assigned and transferred, respectively, in such manner that the same shall become legally and effectually vested in the new Trustee, or Trustees, who shall thenceforth be competent to act in the execution of the trusts herein created, as fully and effectually, with all the same powers and authorities, and subject to all the conditions and restrictions, to all intents and purposes whatsoever, as if originally appointed herein.

Item 13

I hereby appoint my husband, J. Edward Johnston, and my brother-in-law, W. N. Reynolds, Guardians of my minor children, Richard Joshua Reynolds, Mary K. Reynolds, Nancy S.
99 Reynolds, and Z. Smith Reynolds, until they become twenty-one years of age respectively, and I appoint my husband, J. Edward Johnston, sole Guardian of any child or children I may leave by him, until such child or children become twenty-one years of age respectively, and in case either die, resign, or become incapacitated the remaining one and the Safe Deposit & Trust Com-

pany of Baltimore, my Trustee, shall appoint another Guardian so that there will always be two Guardians.

Item 14

I hereby nominate, constitute and appoint my husband, J. Edward Johnston, Executor hereunder of that portion of my estate which may be situated in North Carolina at the time of my death, and I direct that he shall be exempt from the necessity of giving bond as such.

As soon after my death as convenient, I direct my said Executor to pass over, transfer and deliver any of my estate located in the State of North Carolina to those who are entitled to the same under the provisions of this Will, turning over to the Safe Deposit & Trust Company of Baltimore, Trustee, the residue of my estate.

I hereby nominate, constitute and appoint my husband, J. Edward Johnston, and the Safe Deposit & Trust Company of Baltimore, Executors hereunder of all my estate outside of the State of North Carolina, and I direct them to take into custody all of my said estate (except that located in the State of North Carolina), and to make distribution thereof to the devisees hereunder direct according to the provisions of this Will, and I confer upon my said Executors respectively full power and authority to do and perform all acts necessary to carry out the provisions of this Will, and direct that they shall be exempt from the necessity of giving bond as such.

I direct my said Executor or Executors to pay out of the residue of my estate all inheritance, succession, or estate taxes which may by any law be imposed on the legacies and annuities given by this Will, but all such taxes on the Rest and Residue and on "Reynolda, Incorporated" shall be charged against the shares of the persons entitled thereto, and I fully authorize and empower my Executors to borrow such sum or sums as may be necessary to pay all of such taxes and to pledge such of the assets of my estate as in their judgment they may deem proper for security of such sum or sums so borrowed.

I hereby authorize my Executor or Executors to pay any of the legacies by this Will given either in cash or in securities of my estate at their market value at the time of payment.

I hereby provide that the compensation which shall be allowed my Executors for the duties and services performed by them shall be Fifty Thousand ($50,000) Dollars.

In Testimony Whereof I have hereunto subscribed my name and affixed my seal this, 29th day of March, in the year nineteen hundred and twenty-four.

KATHARINE S. JOHNSTON. [SEAL]

Signed, Sealed, Published, and Declared by the above named Testatrix, Katharine Smith Johnston, as and for her Last Will and Testament, in the presence of us, who, at her request,
101 in her presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

JAMES G. HANES,
Residing at Winston-Salem, N. C.
THURMOND CHATHAM,
Residing at Winston-Salem, N. C.
W. R. HUBNER,
Residing at Baltimore, Md.

102 *Deed of Katharine Smith Johnston*

This Deed made this 29th day of December, in the year
104 nineteen hundred and twenty-three, by Katharine Smith Johnston to the Safe Deposit & Trust Company of Baltimore, witnesseth:

That for the purpose of creating the trusts hereinafter expressed, and in consideration of her love for her children hereinafter named, the said Katharine Smith Johnston doth hereby transfer and deliver to the said Safe Deposit & Trust Company of Baltimore 1,736 shares of the R. J. Reynolds Tobacco Company Class A Common Stock, registered as below but all endorsed in blank, viz:

56 Shares in name of Katharine S. Johnston,
500 Shares in name of Scholle Bros.,
1,180 Shares in name of Dominick & Dominick,

which it may retain registered as above or at its pleasure cause the same, or any part thereof, to be registered in its corporate name solely without in any way disclosing the trusts, and it shall hold said stock in trust for her said children as follows:

For Richard Joshua Reynolds, Jr..... 426 Shares,
For Mary K. Reynolds..... 426 Shares,
For Nancy S. Reynolds..... 442 Shares,
For Z. Smith Reynolds..... 442 Shares.

The Safe Deposit & Trust Company of Baltimore as Trustee hereunder shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among, or hold the same for such person or persons, objects or purposes, in trust and otherwise, as such child shall by its Last Will nominate and appoint to take the same, and in default of such appointment shall distribute, transfer and deliver the same to the descendants of such child living at its

death, per stirpes and not per capita, and in default of such appointment and in default of descendants of such child the said Trustee shall at its death divide and distribute the same among such of said children and their descendants as are then
105 living, per stirpes and not per capita, but the shares of such of her said children as are then living shall be held by said Trustee in trust for them and upon the same trusts that their original shares are then held.

Should, however, any of her said children die before the trusts under the Will of R. J. Reynolds have expired or become inoperative, leaving children or appointees entitled to its estate, then said Trustee shall retain in its hands until that time for those entitled to receive the same all shares of Class A Common Stock of the R. J. Reynolds Tobacco Company as may then be in its hands as such Trustee.

Until each of said children becomes twenty-eight years of age the said Trustee shall accumulate and invest the income of said child as part of the corpus of its trust share, and from and after each child becomes twenty-eight years of age said Trustee shall pay the income to said child.

Full power is hereby conferred upon the Safe Deposit & Trust Company of Baltimore as Trustee to sell any part of the trust estates, provided, however, that said Trustee shall not sell any Class A Common Stock of the R. J. Reynolds Tobacco Company, except as follows:

1. That the Trustee may with the consent of the Guardians of any child, or, if such child is twenty-one years of age with its own consent, sell or otherwise dispose of the Common Stock held for such child to it or to any other of said children.

2. That the Trustee may sell or otherwise dispose of any of its holdings of Common Stock if and whenever said Common Stock bequeathed in trust under the Will of R. J. Reynolds shall be sold under the terms provided in his said Will.

3. That the Trustee may sell or otherwise dispose of any
106 of its holdings of said Common Stock which may be remaining in said trust after the trusts created under the Will of R. J. Reynolds shall have become inoperative.

And the Safe Deposit & Trust Company of Baltimore as Trustee hereunder, is hereby authorized to make all necessary transfers and conveyances without any obligation on the part of the purchasers thereof to see to the application of the purchase money, and full power is hereby conferred upon it to invest the Trust Estates and reinvest and change investments of the Trust Estates from time to time in its discretion; provided, however, that during the life of the said Katharine Smith Johnston, and after her death during the life of her husband, J. Edward Johnston, no sale or

change of investment shall be made without her or his approval. After the death of both the said Katharine Smith Johnston and J. Edward Johnston, the said Trustee hereunder may sell, invest, and change the investments of the Trust Estates in its discretion, and it is especially authorized to invest in such proportion of any new issue or issues of stocks or bonds of the R. J. Reynolds Tobacco Company as said Trustee's holdings may entitle it to take under the rights of stockholders to subscribe therefor; and in addition thereto said Trustee is authorized to purchase Common Stock of the R. J. Reynolds Tobacco Company as it may deem to the interest of the estates.

All stock dividends received by the Safe Deposit & Trust Company of Baltimore as Trustee hereunder shall belong to the corpus of the Trust Estates.

The said Katharine Smith Johnston during her life, and after her death her husband, J. Edward Johnston, during his life, and after his death her brother-in-law, W. N. Reynolds, shall vote the Common Capital Stock of the R. J. Reynolds Tobacco Company held in trust herein, and said Trustee is hereby directed from time to time to execute and deliver the necessary authority for that purpose.

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The Safe Deposit & Trust Company of Baltimore as Trustee hereunder shall be allowed for its services a commission of not over two and one-half (2½%) percent on the income by it collected and in no event shall there be made by it any other charge as Trustee.

The said Katharine Smith Johnston hereby reserves unto herself during her life, and hereby confers after her death upon her husband, J. Edward Johnston, the right from time to time, to appoint or substitute a new Trustee or Trustees hereunder, if the Trustee herein appointed, or if its successor or successors, shall refuse to serve, cease to exist, become incapacitated, or resign; or, if, in the judgment of the said Katharine Smith Johnston during her life, or in the judgment of her husband, J. Edward Johnston, after her death it shall be for the best interest of the estates to substitute and appoint another or other Trustees in the place of the then Trustee or Trustees. The appointment or substitution above provided for shall be made by a written instrument, under seal, duly acknowledged, and recorded and filed with the proper keeper of records where required to be filed. Thereupon, and so often as any new Trustee, or Trustees, shall be substituted or appointed, as aforesaid, all the property, real, personal and mixed, of every nature and kind whatsoever and wheresoever situated, which shall be held upon the trusts herein created, shall be conveyed, assigned, and transferred, respectively, in such manner that the same shall become legally and effectually vested in the new

Trustee, or Trustees, who shall thenceforth be competent to act in the execution of the trusts herein created, as fully and effectually, with all the same powers and authorities, and subject
108 to all the conditions and restrictions, to all intents and purposes whatsoever, as if originally appointed herein.

Provided, however, the said Katharine Smith Johnston doth hereby reserve to herself full right and power at any time or times to change, alter or modify the trusts herein created and to establish other trusts, but only for the benefit of any one or more or all of her said children and their descendants; not reserving herein any powers of revocation nor power to retake to herself any beneficial interest in either the principal or income of the Trust Estates.

As Witness her hand and seal.

KATHARINE S. JOHNSTON. [SEAL]

Witness:
JAMES E. HANES.

The Safe Deposit & Trust Company of Baltimore hereby acknowledges receipt of the above mentioned stock.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE,
By W. R. HUBNER, *Asst. Secretary.*

109 In the Supreme Court of North Carolina

Fall Term, 1935. No. 546—Forsyth

ANNE CANNON REYNOLDS, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, J. F. CANNON, AND ANNE CANNON REYNOLDS, II, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, HOWARD RONDTHALER

v.

ZACHARY SMITH REYNOLDS, A MINOR, W. N. REYNOLDS AND R. E. LASATER, GENERAL GUARDIANS OF SAID MINOR, ZACHARY SMITH REYNOLDS, SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE, AS TRUSTEE UNDER THE WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, RICHARD J. REYNOLDS, MARY REYNOLDS BABCOCK, CHARLES BABCOCK, NANCY REYNOLDS BAGLEY, HENRY WALKER BAGLEY, W. N. REYNOLDS AND R. E. LASATER, GUARDIANS OF NANCY REYNOLDS BAGLEY, HARDIN W. REYNOLDS, ETHEL R. REYNOLDS, SUE R. STALEY, THOMAS STALEY, A. D. REYNOLDS, GRACE REYNOLDS, HOGE REYNOLDS, SCOTTIE REYNOLDS, R. S. REYNOLDS, LOUISE REYNOLDS, CLARENCE REYNOLDS, EDNA REYNOLDS, NANCY L. LASATER, R. E. LASATER, LUCY L. STEDMAN,

J. P. STEDMAN, MARY LYBROOK, SAM LYBROOK, D. J. LYBROOK, CHINA LYBROOK, ANNIE D. REYNOLDS, HARDIN W. REYNOLDS, KATHARINE REYNOLDS, WILLIAM N. REYNOLDS, LUCY R. CRITZ, W. N. REYNOLDS, KATE B. REYNOLDS, J. EDWARD JOHNSTON, J. EDWARD JOHNSTON, JR., J. EDWARD JOHNSTON, GUARDIAN OF J. EDWARD JOHNSTON, JR.

Findings and opinion

Appeal by Annie L. Cannon, Co-guardian of Anne Cannon Reynolds II, Anne Cannon Reynolds I (now Smith) and
110 Safe Deposit & Trust Company of Baltimore, Trustee, from Moore, Special Judge, March Special Term, Forsyth Superior Court. Affirmed.

The following judgment was rendered in the Court below:

"This cause coming on to be heard before His Honor, Clayton Moore, Judge Presiding, at the March 11th, 1935, Term of the Superior Court of Forsyth County, and being heard at the said term of said Court, upon the pleadings filed herein and the evidence offered by the respective parties in interest, the Court, upon consideration thereof, finds the following facts:

1. That, in this action as originally constituted, the Cabarrus Bank & Trust Company, one of the duly appointed guardians of Anne Cannon Reynolds, II, filed a motion on April 30th, 1934, to set aside the original judgment entered herein on August 4th, 1931, insofar as said judgment attempted to affect the rights of the said Anne Cannon Reynolds, II, in the trust estates, created by her paternal grandparents, hereinafter referred to.

2. Upon the filing of said motion, an order was duly entered herein making Annie L. Cannon, co-guardian of the said Anne Cannon Reynolds II, a party defendant herein, and ordering her to show cause why the said motion should not be allowed; the said order also commanding the original defendants herein to file any answer which they, or any of them, might have to said motion within twenty days from the service of said order, and that said order, together with a copy of said motion, was duly served upon the original defendants herein, and upon the said Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II.

3. That, subsequent to the order referred to in the preceding paragraph, the Safe Deposit & Trust Company of Baltimore, as trustee under the will of R. J. Reynolds and as trustee un-
111 der the will and deed of Katharine S. Johnston, duly filed an answer to the motion referred to in paragraph one hereof; and that all the other original defendants herein duly filed an answer to said motion.

4. That, subsequent to the service of the order referred to in paragraph two hereof, Annie L. Cannon, co-guardian of Anne Cannon Reynolds II, duly filed herein her motion or response to the motion referred to in paragraph one hereof.

5. That, subsequent to the filing of the motion referred to in paragraph one hereof, the following persons have been duly made parties hereto: Maxie Smith Dunn, Albert B. Walker, John S. Graham, Christopher Smith Reynolds, an infant, Charles Henry Babcock III, an infant, Barbara Frances Babcock, an infant, Nancy Jane Bagley, an infant, Richard J. Reynolds, Jr., an infant, Mary Katharine Babcock, an infant. That R. C. Vaughn, a citizen and resident of Forsyth County, has been duly appointed next friend for the infant Christopher Smith Reynolds; that a guardian ad litem has been duly appointed for the other infants hereinabove named; that serving of process herein has been duly made upon said infants and upon said guardian ad litem; and that, by an order heretofore entered herein, P. Frank Hanes was duly appointed guardian ad litem for any and all persons who may hereafter be born interested in the determination of the issues raised by the pleadings herein, and service of process herein has been duly made upon said P. Frank Hanes, guardian ad litem.

6. That, subsequent to the filing of the motion referred to in paragraph one hereof, the said Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed an interplea herein setting forth his alleged rights in the trust shares therein referred to; and that the Cabarrus Bank & Trust Company, one of the
112 guardians of Anne Cannon Reynolds II, duly filed an answer to said interplea.

7. That, subsequent to the filing of the motion referred to in paragraph one hereof, Richard J. Reynolds, Mary Reynolds Babcock and Nancy Reynolds Bagley, duly filed herein an offer of settlement and petition thereon, proposing a settlement of any and all rights and interests in the trust shares herein referred to, upon the terms and provisions set forth in said offer as amended; that, upon the filing of said offer, an order was duly entered therein directing that said offer of settlement and petition be filed with the Clerk of this Court, and that copies thereof be mailed by said Clerk to all the parties to this action, or to their counsel, or to their duly constituted attorneys in fact, and that all parties hereto have thirty days from the date of said order within which to file an answer to said offer of settlement and petition thereon; and that said order has been duly complied with.

8. That an order was duly entered herein making a party to this action the State of North Carolina on relation of A. J. Maxwell, Commissioner of Revenue; and that, pursuant to said order,

a complaint was filed herein on behalf of the state, alleging that, under the Revenue Laws of North Carolina, the Commissioner of Revenue is entitled to receive and collect from the descendants of R. J. Reynolds, deceased, and Katharine S. Johnston, deceased, a large sum of money as inheritance tax upon the grounds set forth in said complaint.

9. That, subsequent to the proceedings hereinabove referred to, an order was duly entered herein that notice, together with copies of the pleas of intervention of A. J. Maxwell, Commissioner of Revenue, and of Christopher Smith Reynolds, as well as a copy of the offer of compromise and settlement aforesaid, forth-
113 with issue out of this court to each of the infants who are parties to this cause, and the next friend or guardian ad litem of each infant, and the general guardians of Anne Cannon Reynolds II and of J. Edward Johnston, Jr., requiring each and all of said parties to appear herein within thirty days from the date of the service of said notice and copies, and file such plea, answer or response as they might deem advisable; and that, pursuant to said order; said notice, together with the copies therein referred to, were duly served upon the parties described in said order.

10. That thereafter, the Cabarrus Bank & Trusts Company, one of the guardians of Anne Cannon Reynolds II, duly filed a response to said offer of settlement of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, referred to in paragraph seven hereof.

11. That thereafter the Cabarrus Bank & Trust Company, one of the guardians of Anne Cannon Reynolds II duly filed a response to the complaint of the State of North Carolina on the relation of A. J. Maxwell, Commissioner of Revenue, referred to in paragraph eight hereof.

12. That thereafter Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed a response to the offer of settlement of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, referred to in pargraph seven hereof.

13. That thereafter the Safe Deposit & Trust Company of Baltimore, Trustee under the will of R. J. Reynolds, and Trustee under the will and deed of Katharine Smith Johnston, specially appearing under protest, filed an answer to said offer of settlement referred to in paragraph seven hereof.

14. That thereafter Anne Cannon Smith filed an answer
114 and response "To all the motions, interpleadings, proposals, and acceptances filed by the various parties herein."

15. That thereafter Annie L. Cannon, Guardian of Anne Cannon Reynolds II, filed an answer in response to the offer of settle-

ment referred to in Paragraph 7 hereof, and answered the several complaints in the pleas, answers and motions filed in this cause affecting the rights of her infant ward.

16. That thereafter Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed a reply to the response of Anne Cannon Smith referred to in paragraph fourteen hereof, and to the response of Annie L. Cannon, guardian referred to in paragraph fifteen hereof.

17. That thereafter the Reynolds heirs filed an answer to the complaint of the State of North Carolina, and incorporated therein an offer of compromise of the claim of the State of North Carolina, which was amended as above stated.

18. That thereafter, to wit: on January 30th, 1935, an order was entered herein directing that a copy of the offer of compromise referred to in the preceding paragraph, and a copy of said order, be mailed by the Clerk of this court to counsel for all parties and that, all parties within ten days from the date of said order, by filing answers to said proposal, show cause why said proposal should not be accepted and approved by the court, and that said order was duly complied with.

19. That thereafter, in accordance with the order referred to in the preceding paragraph, responses to the offer of compromise of the tax claim referred to in paragraph seventeen hereof was duly filed on behalf of Christopher Smith Reynolds, and also by the Cabarrus Bank & Trust Company as one of the guardians of Anne Cannon Reynolds II, and also by the Safe Deposit & Trust Company, Trustee.

115 20. That thereafter the Reynolds heirs filed a reply to the answer and response of Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II, and in said answer requested that they be allowed to withdraw the proposal of settlement referred to in paragraph seven hereof, unless the court would proceed to consider and act upon and approve the said proposal of settlement; and the Cabarrus Bank & Trust Company filed an objection to such withdrawal, and that Christopher Smith Reynolds, by his next friend, R. C. Vaughn, filed an objection to such withdrawal.

21. That thereafter the Cabarrus Bank & Trust Company filed a reply to the answer and response of Annie L. Cannon referred to in paragraph fifteen hereof, and to the answer and response of Anne Cannon Smith referred to in paragraph fourteen hereof.

22. That thereafter F. Frank Hanes, Guardian ad litem for Richard J. Reynolds, Jr., Mary Katherine Babcock, Charles Henry Babcock III, Barbara Frances Babcock, Nancy Jane Bagley, W. N. Reynolds II, and for any unborn persons interested in the determination of this cause, duly filed an answer to all the pleadings filed by all parties herein since the commencement of the present pro-

ceedings by the motion of Cabarrus Bank & Trust Company and the order of Honorable P. A. McElroy, Judge of the Superior Court under date of April 30, 1934.

23. That thereafter the defendants, W. N. Reynolds, Mary E. Lybrook, T. F. Staley, Jr., W. A. Lybrook, Nancy L. Lasater, H. W. Reynolds, Lucy Reynolds Critz, D. J. Lybrook, Richard S. Reynolds, J. H. Reynolds, Clarence K. Reynolds, Lucy L. Stedman, Samuel M. Lybrook, Harden W. Reynolds, and A. D. Reynolds filed an answer to all pleadings filed in this cause since their answers filed on October 24, 1934.

116 24. That J. Edward Johnston, Jr., by his guardian, J. Edward Johnston, filed an answer to the Offer of Settlement and petition therein, Interplea of Christopher Smith Reynolds, and the Complaint of the State of North Carolina on relation of A. J. Maxwell, Commissioner of Revenue.

25. That the parties to this proceeding are all properly before the Court; that either a next friend or a guardian ad litem has been duly appointed for each and every infant, whether born or unborn, who is now, or may hereafter be, in any way interested in the trust shares hereinafter mentioned; that all persons, whether minors or of age, and whether in esse or in posse, who are now, or who may hereafter be, interested in the trust shares hereinafter mentioned, have been made parties to this action, and have either appeared herein, or been duly served with process herein and with copies of all the foregoing pleadings.

26. That, on July 29th, 1918, R. J. Reynolds died in Forsyth County.

27. That, at the time of his death, and for a long number of years prior thereto, the residence and domicile of the said R. J. Reynolds was and had been in Forsyth County, North Carolina.

28. That the said R. J. Reynolds left surviving him his wife, Katharine Smith Reynolds, and four children, no child of the said R. J. Reynolds having predeceased him, and the four surviving children being named as follows: R. J. Reynolds, Jr., Mary Reynolds (Babcock), Nancy Reynolds (Bagley), Zachary Smith Reynolds (hereinafter referred to as the Reynolds' heirs.)

29. That the said Zachary Smith Reynolds was the youngest of the said four children, having been born on the 4th day of November 1911, and, consequently, he would have arrived at the age of twenty-eight years on the 4th day of November 1939.

117 30. That the said R. J. Reynolds left a last will and testament by the terms whereof, after a specific devise and after certain specific bequests, he devised and bequeathed a portion of the residue of his estates to his wife and devised and bequeathed other portions of the said residue of his estate to Safe Deposit & Trust Company of Baltimore as Trustee, in trust for certain benefi-

ciaries, with specific directions as to the collection and disbursement of the income of said trust estate, and with the provision that if and when each of said children became twenty-eight years of age, it should receive from said trustee certain property of the estate, and that subsection seven of said fourth item read as follows:

"(7) Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said Trustee for the use and benefit of his or her devisees by Will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees, the Trustee, however paying in the meanwhile the income from said share to them; but should any of my children die before that time without having disposed of his or her share by Will but leaving issue him or her surviving, the share of said deceased child shall continue to be held by my said Trustee for the use and benefit of his or her children living at his or her death, paying unto them or applying so much of the net income of the share of my child so dieing as said Trustee may deem necessary for their support and maintenance and accumulating the balance until the time my child so dieing would have arrived at the age of twenty-
118 eight years, if he or she had lived, when the trust shall cease and the estate shall then become vested in his or her children, then surviving; and, should any of my said children die without having made a testamentary disposition of his or her share of my said estate and without issue living at the termination of said trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased children per stirpes; and, should all of my children and their issue die before the termination of the trusts, then, in that event, one-half of the trust estate in value at that time, principal and income, shall go to and belong to my said wife, and the other half to my brothers and sisters then living and the descendants then living of any of my deceased brothers and sisters, per stirpes."

31. That the said last will and testament of the said R. J. Reynolds was duly and regularly probated before the Clerk of the Superior Court of Forsyth County on August 12, 1918, and that, on August 12, 1918, letters testamentary were duly issued by the Clerk of the Superior Court of Forsyth County, North Carolina, to Katharine S. Reynolds, who was nominated and appointed by said Will to act as executrix of that portion of the estate of the

said R. J. Reynolds situated in the State of North Carolina at the time of his death.

32. That a duly authenticated copy of said Will was admitted to record in the Orphans' Court of Baltimore City; and that, on September 5th, 1918, by an order duly entered in said court, letters testamentary were issued to the Safe Deposit & Trust Company of Baltimore, a corporation duly organized and existing under the laws of the State of Maryland, with its principal office and place of business in Baltimore, Maryland, the said Safe Deposit & Trust Company of Baltimore having been nominated and ap-
119 pointed by the said will to act as executor of the estate of R. J. Reynolds consisting principally of securities, stocks, and bonds which were deposited with the Safe Deposit & Trust Company of Baltimore.

33. That the estate of the said R. J. Reynolds was duly settled and the residue thereof was distributed to the Safe Deposit & Trust Company of Baltimore, as trustee under the will of the said R. J. Reynolds; that said trustee duly qualified, and has ever since acted, as such under the terms and provisions of said will; that, acting in said capacity, the said trustee received the trust estate and now holds separately the securities and personal property set aside and so constituting the trust of which the said Zachary Smith Reynolds was the first beneficiary, and has prepared, and now has available, a complete record in reference to the securities and properties so held.

34. That, subsequent to the death of Katharine S. Johnston hereinafter referred to, a question arose as to the amount of net income distributable to each child of the testator, R. J. Reynolds, after attainging the age of twenty-one years, and before attaining the age of twenty-eight years, said question involving a construction and interpretation of the will of the said R. J. Reynolds; that, in order to have said question determined, the said Safe Deposit & Trust Company of Baltimore, Trustee, instituted an appropriate action in the Superior Court of Forsyth County, North Carolina, wherein said question was submitted to, and determined by, the court, a judgment settling said question being signed by Honorable W. F. Harding, Judge presiding at the May 1927, Civil Term of the Superior Court of Forsyth County, and that said judgment has ever since been complied with in administration of said trust.

35. That thereafter a further question arose in ref-
120 erence to the proper construction and application to be made of paragraph Six of Item Four of the said will of R. J. Reynolds, and that thereupon an action was instituted in the Superior Court of Forsyth County by R. J. Reynolds (Jr.) against

the said Safe Deposit & Trust Company of Baltimore, Trustee, and others, for the purpose of obtaining a construction and application of said paragraph of said will; that, in said action, the said Safe Deposit & Trust Company of Baltimore, Trustee, filed an answer; that a judgment was entered in said action, which, upon appeal, was affirmed by the Supreme Court of North Carolina, the opinion of said Court appearing in 201 N. C., beginning at page 267, and that said judgment has ever since been complied with in the administration of said trust.

That one of the issues raised in said case between the Trustee and the plaintiff Richard J. Reynolds as set out in the plaintiff appellant's brief filed in the Supreme Court of North Carolina was the following:

"2. Whether if the contention of the trustee is correct, the plaintiff is not entitled to include in his annual statement income received from his share of the trust estates of his father or mother or both, as 'earnings of money, stocks, or bonds owned by him.'"

That in the appellant's brief in said cause and especially on pages 27, 28, and 29 the argument was squarely presented to the Court, that the children of R. J. Reynolds owned vested interests in his estate with a period of postponed possession until they should respectively attain the age of 28 years, subject only to be divested by death before arriving at that age, which argument was considered by the court and expressly rejected as appears in its opinion heretofore referred to. That the appellant likewise contended that he owned a vested interest for life in the estate
121 of his mother, which was likewise rejected by the Court.

Therefore, the Court holds as a matter of law that the children of R. J. Reynolds did not receive any vested interest in the trust estates of either their father or mother; that by the will of their father they had only the right to receive, if, as, and when payable, certain income from the said estate, and the possibility of receiving property vested both in interest and possession if, as, and when they should respectively attain the age of 28 years; and that under the will of their mother they did not receive any vested interest but merely the right to receive during their respective lives, if, as, and when payable, certain income from the said trust estate.

36. That the said Katharine S. Reynolds, widow of the said R. J. Reynolds, was married to J. Edward Johnston on the — day of June 1921.

37. That, on December 29th, 1923, the said Katharine S. Johnston executed and delivered to the Safe Deposit & Trust Company of Baltimore a certain deed whereby she transferred and delivered to said company certain shares of stock in the R. J. Reynolds To-

bacco Company to be held in trust for her four children named in paragraph four hereof, the said deed containing the following provisions:

"The Safe Deposit & Trust Company of Baltimore as trustee hereunder shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among, or hold the same for such person or persons, objects, or purposes, in trust or otherwise, as such child shall by its Last Will nominate and appoint to take the same, and in default of such appointment shall distribute, transfer, and deliver the same to the descendants of such child living at its death, per stirpes and not per capita, and in default of such
122 appointment and in default of descendants of such child the said Trustee shall at its death divide and distribute the same among such of said children and their descendants as are then living, per stirpes and not per capita, but the shares of such of her said children as are then living shall be held by said Trustee in trust for them and upon the same trusts that their original shares are then held."

38. That the said Safe Deposit & Trust Company of Baltimore, upon the execution of the said deed of trust referred to in the preceding paragraph, duly qualified, and has ever since acted, as trustee under the terms and provisions of said deed; and that said trustee now holds in trust separately the shares of said stock set apart as the shares to be held in trust for the said Zachary Smith Reynolds under the terms of said deed, and also holds the accumulations and re-investments thereof; and has prepared, and now has available, a complete record in reference thereto.

39. That the said Katharine S. Johnston died on May 23rd, 1924.

40. That at the time of her death, and for a long number of years prior thereto, the residence and domicile of said Katharine S. Johnston was and had been in Forsyth County, North Carolina.

41. That the said Katharine S. Johnston left a last will and testament by the terms whereof, after certain specific bequests and devises, it was provided in Item VII of said will in part as follows:

"All the Rest, Residue, and Remainder of my estate, and also the estate in the hands of the Safe Deposit and Trust Company of Baltimore, as Trustee under the Will of my deceased husband, Richard Joshua Reynolds, over which I have power of ap-
123 pointment, I give, devise, and bequeath to the Safe Deposit & Trust Company of Baltimore, in trust to divide the same in equal shares among such of my children and husband as survive me, my husband to take a share equal to that of a surviving child.

"My said Trustee shall at once transfer and deliver the share herein given to my said husband, if he survives me, to be held by him in fee, absolutely free of any trust.

"My said Trustee shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among or hold the same for such person or persons, objects or purposes, in trust or otherwise, as such child shall by its Last Will nominate and appoint to take the same, and in default of such appointment shall distribute, transfer, and deliver the same to the descendants of such child living at its death, per stirpes and not per capita, and in default of such appointment and in default of descendants of such child my said Trustee shall at its death divide and distribute the same among such of my husband, children, and descendants as are then living, per stirpes and not per capita, my said husband, if then living, shall take a share equal to that of a surviving child, but the shares of such of my children as are then living shall be held by said Trustee for them and upon the same trusts that their original shares of my estate are then held.

"Provided, however, notwithstanding anything herein to the contrary that if I shall leave surviving any child by my present husband that such child's trust share shall be set aside entirely from my own absolute estate (no part thereof to be taken from the estate of R. J. Reynolds over which I have power of ap-
124 pointment) but such share shall be equal in value to the share of each of my other children and my husband.

"Should, however, any of my children die before the trusts under the Will of R. J. Reynolds have expired or become inoperative, leaving children or appointees entitled to its share of my estate, then my said Trustee shall retain in its hands until that time in trust for those entitled to receive the same all shares of Class A Common stock of the R. J. Reynolds Tobacco Company as may then be in its hands as such Trustee."

42. That the last will and testament of Katharine S. Johnston was duly and regularly presented before the Clerk of the Superior Court of Forsyth County in May 29th, 1924, and was duly recorded in the office of said Clerk in Book of Wills 9, at pages 19–23; that on May 29th, 1924, letters testamentary were duly issued by the Clerk to J. Edward Johnston who was nominated and appointed by said Will to act as executor of that part of the estate of said Katharine S. Johnston situated in North Carolina.

43. That, upon the death of the said Katharine S. Johnston, and upon the probate of her will as above stated, the said Safe Deposit & Trust Company of Baltimore duly qualified, and has ever since acted, as trustee under the terms and provisions of said will; that a division of the estate and property devised and bequeathed in trust by said will has heretofore been made, including both the individual estate of said Katharine S. Johnston and the property disposed of by her in the exercise of the power of appointment con-

ferred upon her by the will of her first husband, the said R. J. Reynolds, and that the said trustee now holds separately the property, consisting of bonds, stocks, and securities, so set apart and now constituting the property thus held in trust of which
125 the said Zachary Smith Reynolds was entitled to receive certain income including separately such property of the individual estate of the said Katharine S. Johnston and such of the property so disposed of by her in the exercise of her said power of appointment; and that the said trustee has prepared and now has available, a complete record in reference to the securities and property so held.

44. That, surviving her, the said Katharine S. Johnston left her husband, J. Edward Johnston, the four children of her marriage with R. J. Reynolds named in paragraph 28 hereof, and one child of her marriage with the said J. Edward Johnston, the last-mentioned child being named J. Edward Johnston, Jr.; and that no other child of the said Katharine S. Johnston survived her.

45. That, on November 16th, 1929, Zachary Smith Reynolds was married to Anne Cannon, hereinafter referred to as Anne Cannon Reynolds I.

46. That, on August 23, 1930, Anne Cannon Reynolds II was born of the union referred to in the preceding paragraph.

47. That, subsequent to the marriage referred to in paragraph forty-five hereof, the parties to said marriage separated and the said Anne Cannon Reynolds II was left with her mother.

48. That on August 4, 1931, this action was instituted in the Superior Court of Forsyth County, that as will appear from the record herein, all of the Court papers in said action were filed on the same day, to wit: August 4, 1931, said papers including the petition for the appointment of next friends of Anne Cannon Reynolds I and Anne Cannon Reynolds II, both of whom were minors, the order appointing next of friends of said minors, the complaint, the application for the appointment of the guardian ad litem of any unborn persons interested in said action,
126 the answers therein, and the judgment of the Court. That the Cabarrus Bank and Trust Company, Guardian of Anne Cannon Reynolds II, has contended and has introduced evidence to show that prior to the entry of said judgment no evidence was introduced upon which to base said judgment, that the said proceedings were purely formal, and has presented argument to the Court that the decree of the Court was void by reason of the inadequacy of the investigation made by the Court, and the inherent lack of power in the Court to enter the judgment which was entered. The defendants Richard J. Reynolds, Mary R. Babcock, Nancy R. Bagley, and other persons generally designated in this decree

as the Reynolds heirs have introduced evidence to show that the said action was in accordance with the practice of the Court, that evidence was introduced upon all material points and that the court was fully informed as to all of the facts required for forming a judgment, and have presented argument to the Court to show that the said judgment was within the power of the Court and cannot now be attacked upon any of the grounds alleged by the Cabarrus Bank and Trust Company.

That the infant, Christopher Smith Reynolds, through his next friend, R. C. Vaughn, has contended that the said judgment was valid and binding. That Annie L. Cannon, Guardian of Anne Cannon Reynolds II, contends that after the judgment of the Supreme Court in the Cabarrus proceeding, reported in 206 N. C., 276, she knows of no reason why the decree should be set aside, but prays the Court that her ward be relieved of the specific performance thereof.

The Court does not decide any of the issues thus raised and presented by the parties, but does find as a fact and hold as a matter of law that the issues of law and facts existing between the parties as to the validity of the judgment of August 4, 1931,
are sufficiently uncertain that a settlement thereof as pro-
127 posed by the defendants, Richard J. Reynolds, Mary R. Babcock, and Nancy R. Bagley, is proper and that it is for the best interest of all the parties to this cause and especially of Anne Cannon Reynolds II, Christopher Smith Reynolds, and all the other minor parties whose legal representatives have requested the instructions of the Court; that the said issues of law and fact be settled and adjusted as provided in this decree.

49. That prior to his death, to wit: On or about August 21, 1931, the said Zachary Smith Reynolds executed an instrument in the form of a Will complying with the laws of the State of New York as to the execution of Wills by residents of that State, and also complying with the requirements of C. S. 4131 as to the formalities for the execution of a will under the laws of the State of North Carolina, stating therein that he was a resident of Port Washington, Nassau County, in the State of New York; that in said paper the said Zachary Smith Reynolds undertook to execute the powers of appointment conferred upon him by the will of his father, R. J. Reynolds, and by the will and deed of his mother Katharine S. Johnston in favor of his brother, R. J. Reynolds, Jr., and his two sisters Mary Reynolds Babcock and Nancy Reynolds Bagley, to the practical exclusion of all other persons, including his then living child, Anne Cannon Reynolds II, and his then wife Anne Cannon Reynolds I, which said will referred to and ratified the judgment in this cause under date of August 4, 1931, and made

no further provision for Anne Cannon Reynolds II and Anne Cannon Reynolds I, other than a bequest of $50,000.00 to each of them.

50. That Zachary Smith Reynolds' twenty-first birthday would have occurred on November 4, 1932; that at the time of the execution of the instrument referred to in Paragraph 49 the general and testamentary guardians of the said Zachary Smith
128 Reynolds were his uncle, W. N. Reynolds, and R. E. Lasater, who were domiciled in and residents of Forsyth County in the State of North Carolina, and they continued to act and were so domiciled until the date of the death of Zachary Smith Reynolds on July 6, 1932; that the domicile of Zachary Smith Reynolds at the date of his death and at the date of the execution of the instrument referred to in Paragraph 49 was in North Carolina; that a minor is without power to establish a domicile of choice, and that marriage does not change his status; that even if Zachary Smith Reynolds had the power to adopt a domicile of choice and to execute a will in the State of New York at the date of his death, which would affect his personal estate absolutely owned, such a will would not exercise the powers of appointment under the will of his father, R. J. Reynolds, and the will and deed of his mother, Katharine S. Johnston.

51. That on or about November 23rd, 1931, Anne Cannon Reynolds I obtained a judgment of divorce from her husband, Zachary Smith Reynolds, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. That evidence has been introduced and argument presented to the Court by parties whose interests are adverse to that of Christopher Smith Reynolds, to the effect that the said Judgment of divorce rendered by the Court of Nevada is invalid, both by reason of defects inherent in the judgment itself and by further reason of the fact that Anne Cannon Reynolds I did not have a legal residence in the State of Nevada at the time of entry of said judgment, and have further presented arguiment that by reason of the fact that said judgment of divorce was void that the marriage between Zachary Smith Reynolds and Elizabeth Holman Reynolds on November 29th, 1931, in Monroe, Michigan, was not valid.
129 The infant, Christopher Smith Reynolds, has introduced evidence and presented argument to show that the said Anne Cannon Reynolds I was a bona fide resident of the State of Nevada both at the time of the entry of the said judgment of divorce and at the time said proceedings for divorce were commenced. That said divorce was obtained in good faith by the said Anne Cannon Reynolds I and the judgment accepted in good faith by both Anne Cannon Reynolds I and Zachary

Smith Reynolds; and that subsequent to the entry of the said judgment both Anne Cannon Reynolds I and Zachary Smith Reynolds remarried. That said action was in accordance with the practice of the courts of Nevada; that evidence was introduced upon all material points; that the Court was fully informed as to all the facts required for forming a judgment; that the Court had jurisdiction of the persons of both plaintiff and defendant and that said judgment of divorce was binding not only on the State of Nevada but under the Constitution of the United States it is also binding upon every other jurisdiction within the United States of America; and that consequently the marriage of Zachary Smith Reynolds to Elizabeth Holman Reynolds in Monroe, Michigan, on November 29th, 1931, was a valid marriage.

The Court does not decide any of the issues thus raised and presented by the parties, but does find as a fact and holds as a matter of law that the issues of law and fact existing between the parties as to the validity of the judgment of the divorce are sufficiently uncertain as to provoke long, continuous, expensive and vexatious litigation and that a settlement thereof, as proposed by the Reynolds' heirs, is proper, and that it is for the best interest of all the parties to the cause, and especially to Anne Cannon Reynolds II and Christopher Smith Reynolds and all of the other minor parties whose legal representatives have requested instructions of the Court.

130 52. That, on November 29, 1931, the said Zachary Smith Reynolds was married to Elizabeth Holman in Monroe County, Michigan, and said parties continuously resided together thereafter until his death.

53. That, on July 6th, 1932, the said Zachary Smith Reynolds, being still under the age of twenty-one years, died in Winston-Salem, North Carolina; and that the other three children of R. J. Reynolds named in paragraph twenty-eight hereof are still living and are of lawful age; that R. J. Reynolds attained the age of twenty-eight years on April 4, 1934.

54. That the said Elizabeth Holman Reynolds survived the said Zachary Smith Reynolds, and that, subsequent to his death, to wit: on January 10th, 1933, Christopher Smith Reynolds, was born of said union; that no child of said Zachary Smith Reynolds predeceased him; and that, therefore, the said Zachary Smith Reynolds left him surviving the following two children: Anne Cannon Reynolds II, and Christopher Smith Reynolds.

55. That on March 24, 1933, the Safe Deposit and Trust Company of Baltimore, Trustee under the two wills and the one deed heretofore mentioned, filed a bill of complaint in the Circuit Court of Baltimore City; that in said bill of complaint, the said trustee

set out in a full and complete manner all the facts in reference to the three trusts thereby established, attaching to said bill of complaint, as exhibits, exact copies of the three instruments above mentioned, creating said trusts. That the said trustee further set out in said bill of complaint a copy of the entire proceedings in the Superior Court of Forsyth County referred to in paragraph forty-eight hereof, and a full and complete copy of the divorce proceedings of Anne Cannon Reynolds I in the Nevada Court referred to in Paragraph fifty-one hereof; that the said bill of com-
131 plaint also set forth the alleged will executed by Zachary Smith Reynolds on August 21, 1931, referred to in Paragraph forty-nine hereof, and attached to said bill as an exhibit a copy of said will; and that the said trustee thereafter, in said bill of complaint, expressly requested the Court to assume jurisdiction of the three trusts herein mentioned, and to determine and decide what disposition should be made of the trust estates in controversy in this action, and in doing so, expressly raised the following questions of law and fact for determination:

(a) The effect of the Forsyth judgment mentioned in paragraph forty-eight hereof upon the rights of the infant, Anne Cannon Reynolds II.

(b) The validity of the divorce of Anne Cannon Reynolds from Zachary Smith Reynolds mentioned in paragraph fifty-one hereof.

(c) The validity of the marriage of Elizabeth Holman Reynolds with Zachiary Smith Reynolds, mentioned in paragraph fifty-two hereof.

(d) The validity and effect of the alleged will executed in New York by Zachary Smith Reynolds referred to in paragraph forty-nine hereof.

56. That the bill of complaint referred to in the preceding paragraph further set forth that serious questions had arisen relating to the disposition of the said trust estates hereinabove mentioned; that doubts had been suggested with respect to the interpretation of the wills and the deed hereinbefore referred to, and as to the effect of the several proceedings and other matters hereinbefore mentioned and recited, and as to what disposition should be made of said trust estates, and to what extent the same should be held in further trust, or how and among what parties the same should be divided and distributed. That the said bill of complaint also alleged that the doubts so suggested included, among other
132 matters, the validity of the original judgment entered herein on August 4th, 1931, insofar as it attempted to affect the rights of Anne Cannon Reynolds II, the validity of the divorce of the said Anne Cannon Reynolds I from Zachary Smith Reynolds, involving, among other questions, the bona fides of her residence

in the State of Nevada at the time when said divorce was applied for and obtained; the validity of the marriage of the said Elizabeth Holman Reynolds with the said Zachary Smith Reynolds, involving the validity of said divorce from the first wife of said Zachary Smith Reynolds; the validity and effect of said instrument purporting to be executed as a will by the said Zachary Smith Reynolds, as a testamentary appointment by him in pursuance of the powers of appointment conferred upon him by the two wills and the one deed hereinbefore mentioned, such questions involving both the bona fides of any intended residence of his in the State of New York, and the further question as to whether, while still a minor, he could change his residence from the State of North Carolina to the State of New York, with or without the consent or the joinder of his legally appointed guardians in said former state, and the question whether Christopher Smith Reynolds was entitled to any interest in any of the said trust estates under the terms of said instrument.

57. That on November 5th, 1931, by an order of the Clerk of the Superior Court of Cabarrus County, Annie L. Cannon and Cabarrus Bank & Trust Company were duly appointed to act as guardians of Anne Cannon Reynolds II, and thereupon, duly qualified, and have ever since acted in said capacity, the said Annie L. Cannon being the grandmother of the said Anne Cannon Reynolds II, and the Cabarrus Bank & Trust Company being a corporation duly organized and existing under the laws of the State of
133 North Carolina, with its principal office and place of business in Concord, Cabarrus County, North Carolina.

58. That subsequent to the decision of the Supreme Court in The Matter of the Guardianship of Anne Cannon Reynolds II, 206 N. C., 276, the Cabarrus Bank & Trust Company, Guardian of Anne Cannon Reynolds II, conducted negotiations with other parties interested in said trusts in an effort to determine and settle the rights of all beneficiaries in the three trust estates hereinbefore mentioned, including all prospective or contingent beneficiaries therein; that said negotiations were carried on for the purpose of finally settling and determining all the difficult and troublesome questions, both of law and fact involved in a legal and proper administration of said trusts; the purpose of the parties being to bring about a final determination and settlement of the controversies between Anne Cannon Reynolds II, Christopher Smith Reynolds, and the Reynolds heirs, hereinbefore referred to, and more particularly, the controversies as to (a) the validity of the original judgment entered herein; (b) the validity of the divorce of Anne Cannon Reynolds I from Zachary Smith Reynolds and his subsequent marriage to Libby Holman; and (c) the validity and effect of the will attempted to be made by the said Zachary

Smith Reynolds in the State of New York; and after long, tedious, and painstaking consideration by the several attorneys representing the parties above mentioned, the proposal of R. J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley was filed herein, suggesting a determination and settlement of all questions, both of fact and law, relating to the rights of all present, prospective, or contingent beneficiaries in the three trust estates hereinbefore mentioned, in order that all matters in controversy between said parties hereinbefore referred to might be determined and forever settled, so that said trust estates may be henceforth
134 freed from doubt and uncertainty, and administered to the best interests of all parties concerned, and substantially in accordance with the real objects and purposes of the creators of said trust estates, considering the changed situation and condition of said parties in relation to each other, and the contingencies and uncertainties as to which of said beneficiaries would be entitled to receive said trust estates, and in what proportions.

59. That unless the determination and settlement herein provided for is made, the parties to this action and the intended beneficiaries of the trusts established by R. J. Reynolds and Katharine S. Johnston will be plunged into extensive litigation, both in North Carolina and Maryland, and possibly elsewhere, which would doubtless extend over a number of years, and be attended with an enormous amount of expense, uncertainty and risks; that, as a matter of fact, each of the beneficiaries hereafter named would run the risk of jeopardizing all interest in said trust estates. For instance, if the Reno divorce of Anne Cannon Reynolds I from Zachary Smith Reynollds should be held invalid: all rights of Christopher Smith Reynolds in said trust estates would be jeopardized; on the other hand, if the original judgment herein should be held valid, all rights of Anne Cannon Reynolds II in said trust estates other than those set forth in said original judgment, would be jeopardized; if the said judgment should be held invalid, the rights of the Reynolds heirs in said trust estates would likewise be jeopardized. That a failure of the suggested determination and settlement would thus relegate the parties to venturesome, and probably disastrous, litigation, thereby defeating the primary objects of the trusts above mentioned, and practically preventing an effectuation of the intentions of the creators of said trusts; whereas, the suggested determination and settlement would really accomplish the primary objects of said trusts and would
135 effectually carry out the intentions of the creators thereof.

60. There further coming on to be heard in this cause the intervening complaint of the State of North Carolina, setting forth its claim for inheritance and estate taxes; and the court, upon presentation of said complaint, having read and considered the

will of R. J. Reynolds and the will and deed of Katharine S. Johnston for the purpose of determining the nature, character, and extent of whatever interest, or interests, said wills and deed conferred upon Zachary Smith Reynolds, in the trusts thereby established, hereby finds and concludes as follows:

(a) The will of R. J. Reynolds did not bequeath or devise to Zachary Smith Reynolds any vested interest or share in the trust estate (or any part thereof) created and established by said will. A proper construction and interpretation of said will shows that no part of the trust estate established thereby, and none of the accumulated income thereof, would have vested in the said Zachary Smith Reynolds unless and until he arrived at the age of twenty-eight years. Until the said Zachary Smith Reynolds arrived at said age of twenty-eight years, the only interest which he had in the trust estate established by said will (or any part thereof) was to receive such payment from the income thereof, if, as, and when payable to him, under the terms of said will. Consequently, upon the death of the said Zachary Smith Reynolds, prior to reaching the age of twenty-one years, no part of said trust estate (either corpus or income) was transferred from him to anyone.

(b) The will of Katharine S. Johnston did not bequeath or devise to Zachary Smith Reynolds any vested interest or share in the trust estate (or any part thereof) created and estab-
136 lished by said will. The only interest which the said Zachary Smith Reynolds had in said trust established by said will (or any part thereof) was to receive such payments from the income thereof if, as, and when payable under the terms of said will.

(c) The trust deed of Katharine S. Johnston to the Safe Deposit & Trust Company of Baltimore, dated December 29th, 1923, did not confer upon Zachary Smith Reynolds any vested interest or share in the trust (or any part thereof) created and established by said deed. The only interest which the said Zachary Smith Reynolds had in said trust established by said deed (or any part thereof) was to receive such payments from the income thereof if, as, and when payable under the terms of said deed.

(d) Upon the death of Zachary Smith Reynolds intestate, without exercising the powers of appointment conferred upon him by the will of R. J. Reynolds and the will and deed of Katharine S. Johnston, the right of the State of North Carolina, under the 5th provision of Sections 7880 (1) of the Consolidated Statutes of North Carolina, to collect inheritance and estate taxes out of certain of the parties to this action presents difficult questions which would doubtless result in long, expensive, and uncertain litigation.

(e) Negotiations have been conducted between the State of North Carolina, and the attorneys for Richard J. Reynolds, Mary Reynolds Babcock; and Nancy Reynolds Bagley, in reference to a settlement by way of a lump sum compromise to satisfy and fully settle whatever right or claim the State of North Carolina may have, if any, on account of such taxes. As a result of said negotiations, a proposal has been made that a full settlement shall be made by way of a lump sum compromise of any and all such right or claims, if any, which the State of North Carolina might,
137 or may have, by reason of the facts set forth in the intervening complaint of the State of North Carolina in this action, by the payment to the State of North Carolina of the sum of two million dollars. The said Richard J. Reynolds, Mary Reynolds Babcock; and Nancy Reynolds Bagley, have expressed a willingness to pay said sum in full settlement of said claims, insofar as their interests may be affected, provided such settlement be approved by the court, insofar as the minors may be affected, such payment, however, to be made solely out of the trust estates created by the will of R. J. Reynolds and the will and deed of Katharine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary, in proportion to their respective values at the date of this decree, nothing in this compromise offer or its acceptance and approval, to impose any personal liability upon any of the parties to this action. The guardians of Anne Cannon Reynolds II and Christopher Smith Reynolds have requested the instruction and advice of the court in reference to participating in said settlement, insofar as the burden thereof may fall upon said minors.

(f) Upon a thorough and complete consideration of all the facts and circumstances relating to the claim of the State of North Carolina for said taxes, the court finds as a fact that the settlement of the taxes herein referred to is for the best interest of all parties concerned, including the infants Anne Cannon Reynolds II and Christopher Smith Reynolds, and said settlement is hereby fully approved by the court, and the guardians of said infants are hereby advised, instructed, authorized, and empowered to participate in said settlement on behalf of said infants; and it is hereby ordered and decreed that the Safe Deposit and Trust Company of Baltimore, Trustee, out of said trust funds, pay to the State of North Carolina, the sum of two million dollars in full settlement of any and all claims or demands which the State now has,
138 or may hereafter have, by reason of the things and matters set forth in the intervening complaint herein, such payment to be made solely out of the trust estates created by the will of R. J. Reynolds and the will and deed of trust of Katharine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary in pro-

portion to their respective values as of the date of this decree, and nothing herein to impose any personal liability upon any of the parties to this action. That the said sum of $2,000,000.00 is to be paid to the State of North Carolina when and if this decree becomes effective, and shall be in full settlement of any and every claim of the State of North Carolina for inheritance taxes, penalties, and interest.

Wherefore, upon the findings of fact and conclusions of law hereinbefore and hereinafter set forth, it is hereby considered, ordered, and adjudged as follows:

I. That the original judgment entered herein on August 4, 1931, be, and it hereby is, modified as follows:

(a) That the establishment of the trust fund of Five Hundred Thousand Dollars for the benefit of Anne Cannon Reynolds I, as therein provided for, is hereby approved, with the qualification that said trust fund shall henceforth be held by the Safe Deposit & Trust Company of Baltimore, Trustee, only upon the following terms and provisions, to wit:

That the said Anne Cannon Reynolds I shall be entitled to receive out of the net income arising therefrom, and there shall be paid to her therefrom monthly, the sum of six hundred (600) dollars until she arrives at the age of twenty-five years, when the total accumulated income shall be paid to her, and thereafter all income shall be paid her monthly so long as she lives; that upon the death of the said Anne Cannon Reynolds I, the corpus of said trust fund, together with any and all undistributed income,
139 shall be paid to Anne Cannon Reynolds II if living; if Anne Cannon Reynolds II is not living at the death of Anne Cannon Reynolds I, then to be distributed to the next of kin of said Anne Cannon Reynolds II upon her mother's side to the exclusion of her next of kin on her father's side; provided further, that the corpus of said trust fund shall be held by the Safe Deposit & Trust Company of Baltimore, Trustee, until the death of Anne Cannon Reynolds I or November 4, 1939, whichever shall occur last.

(b) That the trust fund therein established for the benefit of said Anne Cannon Reynolds II, together with all accumulated or undistributed income thereon, shall be returned by the Trustee to the trust estate of R. J. Reynolds from which it was created by the decree of the Superior Court of Forsyth County, dated August 4, 1931, and the rights of the parties in reference thereto shall be placed in statu quo, just as if no action whatever in reference to said fund had ever been taken under said judgment.

II. That the Safe Deposit & Trust Company of Baltimore, Trustee, shall hereafter hold the trust estate established by the will of R. J. Reynolds of which Zachary Smith Reynolds was the

first beneficiary, and shall likewise hold the trust estate established by the will of Katharine S. Johnston of which Zachary Smith Reynolds was the first beneficiary, and shall likewise hold the trust estate established by the deed of Katharine S. Johnston dated December 29, 1923, of which Zachary Smith Reynolds was the first beneficiary, upon the following trusts, to wit:

(a) First, to pay whatever State or Federal estate or inheritance taxes, if any, may be legally due and payable by reason and to the extent of any interest, if such there were, of the said Zachary Smith Reynolds in each of the said three trust estates herein
140 mentioned, and to pay any compromise of any claim for any State or Federal estate or inheritance taxes if any against the said trust estates which may be directed or approved by this Court or any other court of competent jurisdiction.

(b) Second, to pay out of any one or more of the said trust estates to Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley the sum of $250,000.00 each with interest at 3½% from July 15, 1934, said sums to be reduced, however, by their proportionate part of whatever State or Federal estate or inheritance taxes may be paid, as heretofore provided in this judgment. It is the intention of these parties, as soon as said sums are available to them under the proper decrees of the courts to which this proposal is submitted, to give the sums provided in this paragraph to Mrs. Elizabeth Holman Reynolds, mother of Christopher Smith Reynolds, and they shall be reimbursed out of said trust estates before the distribution of the trust estates provided for in Sections C and D of this Paragraph to the extent of any gift or transfer taxes which may be imposed upon them or any of them by reason of said gifts to Elizabeth Holman Reynolds.

(c) Third, that the entire net trust estates established by the will and deed of Katharine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary, now in the hands of the Safe Deposit & Trust Company of Baltimore, Trustee, as Trustee under said trust instruments, after making the payments provided for in Paragraph II (a) and (b) of this judgment, shall be immediately divided and paid by the Trustee, free from all trusts, as follows:

1. 25% to the legal guardian of Christopher Smith Reynolds.
2. 37½% to Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley.
141 3. 37½% to the Cabarrus Bank & Trust Company and Annie L. Cannon, Guardians of Anne Cannon Reynolds II.

That the principal and accumulated income in the trust estate established by the deed of Katharine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary, now in the hands of Safe Deposit and Trust Company, of Baltimore, Maryland,

as Trustee under said instrument, shall be held by the Trustee under the terms of said instrument, and the income therefrom accumulated for the benefit of the persons named in the next preceding paragraphs, Numbers 1, 2, and 3, respectively, until November 4, 1939, at which time the said trust estate shall be divided and paid by the Trustee to the aforesaid persons in the proportions specified in said paragraphs.

The Court has considered paragraphs (1) and (2) of Item Fourth of the Will of R. J. Reynolds, together with the Will of Katharine S. Johnston, exercising the power of appointment therein conferred upon her, and holds that the income from that part of the common capital stock in the R. J. Reynolds Tobacco Company appointed by Katharine S. Johnston in trust for Zachary Smith Reynolds as the first beneficiary is now held by the Safe Deposit and Trust Company of Baltimore, Trustee under the Will of R. J. Reynolds, upon the trusts created by the Will of R. J. Reynolds, of which Zachary Smith Reynolds was the first beneficiary, and shall be held and distributed by the Safe Deposit & Trust Company as Trustee under the Will of R. J. Reynolds, as provided in paragraph II (d) of this judgment.

The Court further holds, upon a consideration of the said Wills, that the shares of the common capital stock of the R. J. Reynolds Tobacco Company appointed by Katharine S. Johnston in trust for Zachary Smith Reynolds as the first beneficiary, shall be held by the Safe Deposit & Trust Company, as aforesaid, for
142 the benefit of the persons, and in the proportions in sub-paragraphs 1, 2, and 3 of this paragraph, who are entitled to the distribution of the estate of Katharine S. Johnston, paying the income to said persons in said proportions until November 4, 1939, when the shares of the common capital stock of the R. J. Reynolds Tobacco Company shall be delivered to them in said proportions free from all trusts.

In the event that Anne Cannon Reynolds II or Christopher Smith Reynolds should die prior to November 4, 1939, the distribution of the share of the child so dying in the trust established by the deed of Katharine S. Johnston, and in the shares of the common capital stock of the R. J. Reynolds Tobacco Company appointed by the Will of Katharine S. Johnston in trust for Zachary Smith Reynolds as the first beneficiary, shall be made on November 4, 1939, to its next of kin on its mother's side to the exclusion of its next of kin on its father's side.

(d) Fourth: that the entire net trust estate established by the Will of R. J. Reynolds, of which Zachary Smith Reynolds was the first beneficiary, now in the hands of the Safe Deposit & Trust Company of Baltimore, as Trustee under said instrument, after making the payments provided for in Paragraph II (a) and (b)

of this judgment, shall be immediately divided by said Trustee and held for the benefit of the following parties and upon the following terms:

1. 25% for Christopher Smith Reynolds.
2. 37½% for Anne Cannon Reynolds II.

In calculating the proportions to be allotted as herein provided the trust fund of $500,000.00 in which Anne Cannon Reynolds I is interested as provided in the original decree in this cause, which is to be modified as set out in Section I (a) of this judgment, shall, for the sole purpose of making such calculation, be valued
143 as of July 6, 1932, and added to the trust estate created by the will of R. J. Reynolds from which it was taken, without any deduction by reason of the interest therein of Anne Cannon Reynolds I, and in determining the 37½% allotted to Anne Cannon Reynolds II as herein adjudged the said trust fund of $500,000.00 shall be allotted to and treated as a credit upon the 37½% allotted to Anne Cannon Reynolds II at its full value on July 6, 1932, without any deduction by reason of the interest therein of Anne Cannon Reynolds I.

3. 37½% to the Safe Deposit & Trust Company of Baltimore, Trustee, to be held by it in trust for the benefit of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley as hereinafter provided in this paragraph.

That between the date of the entry of this decree and the 4th day of November 1939, the Safe Deposit and Trust Company of Baltimore, Trustee, shall pay to the legally constituted guardians of Christopher Smith Reynolds and Anne Cannon Reynolds II all of the income from the shares herein allotted to said infants in quarterly payments, and on the 4th day of November 1939, shall pay over and deliver to the legally constituted guardians of said Christopher Smith Reynolds and Anne Cannon Reynolds II the entire trust estates allotted to said infants by this paragraph of this judgment, free from all trust, and if either of said infants should die prior to November 4, 1939, the income from the share allotted to said infant shall be paid to the next of kin of the said infant upon its mother's side to the exclusion of the next of kin on its father's side, as herein provided until November 4, 1939, and on November 4, 1939, the entire trust estate allotted to said infant by the terms of this paragraph shall be paid and delivered by the Safe Deposit & Trust Company of Baltimore,
144 Trustee, to the next of kin of the said infant upon its mother's side, to the exclusion of the next of kin on its father's side.

That the 37½% allotted to Safe Deposit & Trust Company of Baltimore, Trustee for Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley by this paragraph of this

judgment shall be held by the Safe Deposit & Trust Company of Baltimore, Trustee, under the Will of R J. Reynolds, as provided by the Will of R. J. Reynolds, as if Zachary Smith Reynolds had died intestate and without leaving issue surviving him. The Court hereby construes and interprets Item Fourth, Paragraph (7) of the will of R. J. Reynolds, which is as follows, "and should any of my said children die without having made a testamentary disposition of his or her share of my said estate and without issue living at the termination of said trust then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased child per stirpes," and holds that upon the death of Zachary Smith Reynolds intestate and without leaving issue surviving him the 37½% allotted by the terms of this paragraph of this judgment for the benefit of Richard J. Reynolds, Mary Reynolds Babcock and Nancy Reynolds Bagley shall be divided by the Safe Deposit & Trust Company of Baltimore, Trustee, into three equal parts, which three equal parts shall be respectively added to and become a part of the trusts created by Item Fourth, Paragraph (4), (5), (6) and (7) of which the said Richard J. Reynolds, Mary Reynolds Babcock and Nancy Reynolds Bagley are the first beneficiaries; that Richard J. Reynolds arrived at the age of 28 years on April 4, 1934, and is now entitled to receive one-third of the 37½% allotted to him as herein provided, free from all trust, and the Safe Deposit & Trust Company of Baltimore, Trustee, is hereby directed to make the payment to him of one-third of said 37½% free from all trust, that
145 Safe Deposit & Trust Company of Baltimore, Trustee, shall hold 1-3 each of 37½% respectively of each of the trusts created by Item Fourth, Paragraph (4), (5), (6), and (7) of the Will of R. J. Reynolds, of which Mary Reynolds Babcock and Nancy Reynolds Bagley are respectively the first beneficiaries, that they will not be entitled to receive any income from said share prior to their respective 28th birthdays in excess of the sum of $50,000.00 provided for in Item Fourth, Paragraph (5) of the Will of R. J. Reynolds, but that they have the right by trust indenture to transfer their interest in the one-third of the 37½% allotted to each of them by this judgment to the trustees of the charitable trust referred to in Paragraph 10 of their offer of settlement and petition in this cause, and in the event that they, or either of them, should die before reaching the age of 28, to direct the payment of said share to the trustees of said charitable trust by will as provided in the first clause of Item Fourth, Paragraph 7 of the Will of R. J. Reynolds.

That the shares of the trust estate of R. J. Reynolds referred to in this paragraph as allotted herein shall vest as of the date of this decree in the said Christopher Smith Reynolds, Anne

Cannon Reynolds II, and Safe Deposit & Trust Company of Baltimore, Trustee, for the benefit of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, free from any claim or right of any of the other parties in and to the said trust funds, and free from any contingency by which any of the parties hereto might be prevented from claiming the share allotted to them upon the date fixed for distribution, free from all trust, by the terms of this judgment.

(e) In order that the intention of the parties hereto may be attained, and the provisions of this judgment may be effectuated, the said parties, to wit: Christopher Smith Reynolds, the
146 Reynolds heirs, and Anne Cannon Reynolds II, shall hold that portion of the said three trust estates herein allotted to him, her, or them absolutely free and clear from any and all claims of every nature, character, or description, which now or hereafter may be made against said portion by any other one of said parties; and that each of said parties, in consideration of the mutual transfers and releases herein decreed, shall be deemed to have transferred, conveyed, and released each to the other, all right, title, and interest, present or future, which each of said parties may have in said three trust estates, other than the portion herein specifically allotted to each, and it is further decreed that this judgment shall act as a transfer, conveyance, and release of said respective interests as aforesaid; and it is herein further decreed that no party to this action shall now or henceforth have any right, title, or interest or claim whatsoever, in any of said trust estates other than as herein specifically set forth; and it is herein further ordered and decreed that the proportionate part of each one of the parties above mentioned as hereinbefore set out, shall absolutely and unconditionally vest in such party.

(f) The personal estate of Zachary Smith Reynolds now held by Moses Shapiro as collector of said estate pursuant to the orders of Superior Court of Forsyth County after the payment of the debts of said estate and all taxes and other lawful charges therefrom, shall be divided equally between Elizabeth Holman Reynolds, Anne Cannon Reynolds II, and Christopher Smith Reynolds.

III. That the determination and settlement of the rights of all parties particularly including Anne Cannon Reynolds II and Christopher Smith Reynolds as herein decreed is just, fair, and equitable; that it is for the best interests of all parties, and
147 of all the present, prospective, or contingent beneficiaries of the three trusts hereinbefore mentioned; that such determination and settlement will substantially comply with the terms and conditions of the instruments creating said trusts, considering the changed situation and condition of said parties in relation to

each other, and the contingencies and uncertainties as to which of said beneficiaries would be entitled to receive said trust estates, and in what proportion; that it will, to a large extent, prevent a dissipation and waste of a large part of the said trusts, and that it will accomplish the objects and effectuate the intention of the creators of said trusts.

IV. In the event that Christopher Smith Reynolds or Anne Cannon Reynolds II should die before attaining his or her majority, then and in that event any and all property allotted to said minor, or any interest thereon which he or she takes under this judgment, shall vest in his or her next of kin on his or her mother's side to the exclusion of the next of kin on his or her father's side.

V. This judgment is based upon and entered in conformity with the Offer of Settlement filed in this cause by Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, and is entire and indivisible.

VI. This cause is retained for further orders, for the purpose of permitting the guardians or other representatives of minor parties to this cause and the attorneys for any parties to this cause to file petitions for allowance of compensation which said allowances shall be fixed by the Judge of this Court.

VII. That the proposal hereby approved and this judg-
148 ment be presented in the suit now pending in the Circuit Court of Baltimore City, Maryland, hereinbefore mentioned.

CLAYTON MOORE,
Special Judge presiding at the Special March 11th Term, 1935, of the Superior Court of Forsyth County.

Anne Cannon Reynolds (Smith), Annie L. Cannon, one of the Guardians of Anne Cannon Reynolds II, and Safe Deposit & Trust Company of Baltimore, Trustee, etc., duly made exceptions and assignments of error and appealed to the Supreme Court. The material assignments of error, without particular reference to same, and necessary facts will be considered in the opinion.

Hartsell & Hartsell, for Anne Cannon Reynolds Smith; Brooks, McLendon & Holderness, for Annie L. Cannon, one of the Guardians of Anne Cannon Reynolds II; Cansler & Cansler, William H. Beckerdite, Mabel C. Moysey, John M. Robinson, for Cabarrus Bank & Trust Co., one of the Guardians of Anne Cannon Reynolds II; Manly, Hendren & Womble, P. C. McDuffie, of Atlanta, Ga., Ratcliff, Hudson & Ferrell, for R. J. Rey-

nolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley; Polikoff & McLennan and William Graves, for R. C. Vaughan, next friend of Christopher Smith
149 Reynolds, infant; Charles McH. Howard, for Safe Deposit and Trust Company of Baltimore, Trustee; A. A. F. Seawell, Atty. General, and John W. Aiken and T. W. Bruton, Asst. Atty. Generals for the State of
arkson, J. North Carolina.

This controversy has heretofore been before this Court: In re matter of the Guardianship of Anne Cannon Reynolds II, 206 N. C. 276.

We think it unnecessary to discuss the question as to Anne Cannon Reynolds' (now Smith) right to be heard on this record, except as an amicus curiae. She is now of age and the mother and natural guardian of Anne Cannon Reynolds II. In this Court, through her counsel, Anne Cannon Reynolds (Smith) says that she approves the position taken by the Safe Deposit & Trust Company of Baltimore, Trustee, and Annie L. Cannon, one of the Guardians of Anne Cannon Reynolds II, but later in her brief says: "The individual rights of this appellant acquired under and by virtue of the judgment of August 4, 1931, have not been materially changed by the judgment of the Court below, and, therefore, she asks nothing in her individual right. However, as natural guardian of her child, Anne Cannon Reynolds II, she desires that this Court be fully informed as to her position taken. This appellant has always expressed a desire that the matters in controversy in this cause be settled, as will appear from the judgment of August 4, 1931, and her affidavit in the Cabarrus proceedings: 'Owing to the many family questions which were under consideration in reaching the family agreement approved by the Court, and in view
150 of the litigation now pending in Maryland involving many other family questions affecting not only the fortunes but the good name of affiant, her child, and the infant's family on both sides.' She believes that the only rights to be considered in this cause are those of her child and Christopher Smith Reynolds and that they alone are entitled to the trust funds in controversy, and she is further of the opinion that these differences can now be settled without the interference of those who are asserting claims based on bare or very remote possibilities." That she took no part until order was issued to her, on Nov. 16, 1934, by the Court. That the question of the validity of her divorce was not raised by her, but questioned (1) by the Reynolds heirs (Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, (2)

Cabarrus Bank & Trust Co., co-guardian in its response to the interplea of Christopher Smith Reynolds (by his next friend R. C. Vaughn), (3), Safe Deposit & Trust Company of Baltimore, Trustee, when it answered the offer of settlement of the Reynolds heirs. Further: "This appellant does not desire to have the validity of her divorce questioned in the courts of this State and respectfully requests this Honorable Court not to direct that the same be done. The Reynolds heirs, Christopher Smith Reynolds, and Cabarrus Bank & Trust Company, co-guardian of Anne Cannon Reynolds II, have each claimed the entire trust estates to which Zachary Smith Reynolds was entitled, but this appellant places her child in the custody of this Court and requests only that to which she is entitled. In order that the matters and things in controversy in this action might be finally determined, this appellant respectfully requests this Court to fully protect the rights of her infant child, Anne Cannon Reynolds II, and to declare in its opinion just what property interests the respective parties are entitled to and direct that judgment be entered accordingly, giving to each what the law and equity directs, no more and no less."

151 It would appear from the above that in the final analysis the mother and natural guardian put her child in the "lap of the Chancellor."

It is well settled that ordinarily the admission of Attorneys bind their clients "Admission of Attorneys bind their clients in all matters relating to the progress and trial of the cause and are in general conclusive." 1 Greenleaf on Evidence, 186; Lumber Co. v. Lumber Co., 137 N. C., 431 (438); Bank v. Penland, 206 N. C., 323 (324).

On November 16, 1929, Zachary Smith Reynolds was married to Anne Cannon. Both were minors, but of legal age to marry. On August 23, 1930, Anne Cannon Reynolds II was born of the union. In a short period of time after the marriage, the parties to said marriage separated. Anne Cannon Reynolds II, the infant, was left with her mother. On August 4, 1931, an action was instituted in the Superior Court of Forsyth County by Anne Cannon Reynolds (now Smith). This action seems to have been started under C. S. 1667, which gave the wife a legal right to make her husband provide for her and her child necessary subsistence, according to his means and condition in life; but it became elastic and reached out and deprived the infant, Anne Cannon Reynolds II of her rights in the estate of her grandparents. The trusts set up under the agreement, for Anne Cannon Reynolds II, the infant, was $500,000. Her portion is now estimated, under the facts of this record, to be worth some $12,000,000 or more. It provided for Anne Cannon Reynolds (now Smith) $500,000, which she in her brief says is not materially changed by the present decree, and she asks

nothing in her individual right. The decree uses this language: "That the minor plaintiffs, Anne Cannon Reynolds and Anne Cannon Reynolds II, upon the execution and delivery of said
152 contract and trust agreement and the setting up of the trust estate therein provided, be and they are hereby declared forever estopped and barred from making other or further claims for financial support, aid or maintenance from the said Zachary Smith Reynolds, or any estate owned or left by him, whether the same be held in trust or otherwise, and from making further claim to the whole or any part of the trust estates created by the will of R. J. Reynolds or Katharine S. Johnston, distribution of said trust estates at the time fixed for distribution as provided in said wills, to be made to the persons entitled thereto as if Zachary Smith Reynolds and Anne Cannon Reynolds had never been married and Anne Cannon Reynolds II had never been born. The Safe Deposit & Trust Company of Baltimore, Trustee, sets up these trust estates under the decree.

On November 23, 1931, Anne Cannon Reynolds obtained a divorce from her husband, Zachary Smith Reynolds, in the 2nd Judicial District Court of the State of Nevada, and in and for the County of Washoe. One November 29, 1931, Zachary Smith Reynolds was married to Elizabeth Holman, in Monroe, Michigan, and they resided together until his death on July 6, 1932—under the age of 21 years. On January 10, 1933, Christopher Smith Reynolds was born of said union. Thus, at his death, Zachary Smith Reynolds left two children—Anne Cannon Reynolds II and Christopher Smith Reynolds, in ventre sa mere. Under the laws of both the State of New York and the State of North Carolina, a will executed by a parent prior to the birth of a child, is inoperative as to said child. The proported will in controversy was executed prior to the marriage of Zachary Smith Reynolds and Elizabeth Holman and prior to the birth of Christopher Smith Reynolds.

Before the Cabarrus County Clerk, on September 8, 1931, on petition of the father of Anne Cannon Reynolds, the Cabar-
153 rus Bank & Trust Co. and Annie L. Cannon, on Nov. 5, 1931, were appointed guardians of the estate of Anne Cannon Reynolds II, alleging that she was entitled to the income from $500,000, the amount set up in the before mentioned decree.

On March 24, 1933, the Safe Deposit & Trust Co., of Baltimore, Trustee, under the wills and deeds of the grandparents of Anne Cannon Reynolds II, filed a bill of complaint in the Circuit Court of Baltimore City, setting out in full the complete story of the tangled web, and raised certain questions of law and fact for determination. Conferences were held, letters exchanged between the attorneys for the Guardians of Anne Cannon Reynolds II, in reference to a joint attack on the decree of August 4, 1931, but

of no avail. On April 1, 1933, the Cabarrus Bank & Trust Co., one of the Guardians of Anne Cannon Reynolds II, finally filed in the Superior Court of Cabarrus County a petition setting forth the facts and praying for advice and instructions of the Court in reference to filing a motion in the original cause in Forsyth County, "for the purpose of attacking the validity of said judgment, insofar as it purported to affect the interests of its ward in said trust shares."

The said Annie L. Cannon, co-guardian of Anne Cannon Reynolds II, filed an answer in which she asserted the validity of the original judgment, and purported to set forth the facts which she contended showed such validity. In her answer, the said Annie L. Cannon, co-guardian aforesaid, set out in full her reasons for not attacking the validity of the judgment originally entered therein, and urged the acceptance of a new and "tentative proposition" of Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, hereafter called the Reynolds heirs. The "tentative proposition" increased the $500,000 given in the Forsyth County Judgment and decree $1,500,000—making a total of $2,000,000. This "tentative agreement" was ap-
154 proved by the Court. On appeal to this court, in the main opinion In re Reynolds, supra, it is said (at p. 293): "The petition of the Cabarrus Bank & Trust Company, Guardian of Anne Cannon Reynolds II should have been granted." That (p. 278–9) "After reading and considering said petition and response thereto, and the affidavits appearing in the record, and the various exhibits appearing in the record, and after hearing argument of counsel, the court, upon the undisputed facts, finds that the petitioner has shown reasonable, adequate, sufficient, and probable cause for filing a motion in the Superior Court of Forsyth County, in the action above entitled, praying that the decree in said action be set aside upon the following grounds," etc. (p. 280) "It is the duty of the guardians to file the proper and appropriate motion in the said action in Forsyth County for the purpose of having the decree entered therein set aside in so far as it affects the rights of the said Anne Cannon Reynolds II, the merits of said motion to be finally passed upon and determined upon the hearing thereof in the Superior Court of Forsyth County. The court further holds that the guardians should immediately take the necessary steps to protect the interests of their ward in the Maryland action referred to in the petition. The court further holds that the alleged new proposal, purporting to be submitted for or on behalf of the relatives of Zachary Smith Reynolds, involving the establishment of a foundation to the memory of Zachary Smith Reynolds, is not before the Court. That the persons for or on behalf of whom said proposal is submitted are not parties properly before

this court upon the hearing of the petition in this matter; that, consequently, in any event, this court could not properly consider such alleged proposal upon the hearing of the petition herein; that, if any new proposal is to be made, it should be addressed to the Superior Court of Forsyth County, in the action
155 to which all persons in interest are parties." Adams, J., concurs in the result. Stacy, C. J., concurring, said (pp. 294–5): "The ruling was evidently based upon the assumption that the Forsyth decree is valid, otherwise the amount probably surrendered is disproportionate to the amount tentatively offered. But the validity of the Forsyth decree was not before the court for determination. The question was whether sufficient showing had been made to warrant the instruction that the validity of this decree should be challenged. Apparently the showing was such as to justify the court in informing itself upon the validity of this decree before finally foreclosing the rights of the infant ward in the respect suggested. Nevertheless, it is said the practical certainty of a million and a half under the circumstances disclosed by the record, is better for the infant than the uncertainty of the quest for twelve millions. The matter was not presented before the Court with sufficient knowledge and in such shape as to call for the exercise of its discretion on the acceptance or rejection of this tentative proposition. The two guardians are the only parties to this proceeding, and they alone in their representative capacity would be bound by the judgment. No ward can complain if his guardian in good faith and in the exercise of his best judgment pursues the mandate of the law and loses a tentative offer of settlement such as here disclosed, but he might question a departure from established rules of procedure."

Justice Brogden, concurring in result, said (pp. 296–7): "Hence, the sole question before the chancellor was whether the minor, Anne Cannon Reynolds II, had the right to proceed to Forsyth County and lodge a motion to set aside a judgment which shut the door of the law in her face so far as asserting any further right in and to the property specified. There were no parties before
156. the Court except the guardians. The petition alleged grave irregularities and fatal defects in the Forsyth judgment. These allegations were denied and evidence offered in support of such denial. The New York will was not upon the lap of the chancellor. The family settlement and the laudable intentions of the family were not upon the lap of the chancellor. The actual validity of the Forsyth judgment was not upon the lap of the chancellor. The ultimate question was whether the minor had alleged and shown the existence of such facts or probable facts as to entitle her to be heard by the law of her country in a proceeding in Forsyth County to unloose the bar of that judgment.

The guardians held in good faith opposite opinions as to the wisest course to pursue. Notwithstanding, it must be borne in mind that Anne Cannot Reynolds II is the heroine of the play and the clashing judgment of the guardians is incidental and secondary. The trial judge found that it was not for the best interest of the minor to be allowed to be heard in Forsyth County. Both the history and traditions of equity as held and applied in this State demonstrate that it always lends an attentive ear to the call of widows, orphans and minors, and in determining the bare right to be heard upon the merits of a proposition, it has not required the highest and most technical degree of proof. I am of the opinion that the facts disclosed in the record are sufficient to entitle Anne Cannon Reynolds II to a chance to be heard in the courts in a proper proceeding in Forsyth County. Of course, even a minor ought not to be heard in an assault upon a final judgment for inconsequential or captious reasons. Neither should the right to be heard upon the merits be denied because the evidence produced is not 'horse high, bull strong, and pig tight.' Therefore, I am of the opinion that the trial judge erred in denying to the minor the right to be heard upon the merits of the controversy. The Forsyth decree may have been eminently
157 proper and advantageous not only at the time it was rendered, but even now. The proposed family settlement may be eminently wise and proper. That, however, is not the point. The right of the minor to question the proceedings in Forsyth in the due and orderly manner prescribed by law, is the point as I conceive it, and that right has been improvidently denied by the judgment rendered."

In accordance with the decision of this Court, the Court below in its judgment found: (1) "That, in this action as originally constituted, the Cabarrus Bank & Trust Company, one of the duly appointed guardians of Anne Cannon Reynolds II, filed a motion on April 30th, 1934, to set aside the original judgment entered herein on August 4th, 1931, insofar as said judgment attempted to affect the rights of the said Anne Cannon Reynolds II in the trust estates, created by her paternal grandparents, hereinafter referred to. (2) Upon the filing of said motion, an order was duly entered herein making Annie L. Cannon, co-guardian of the said Anne Cannon Reynolds II, a party defendant herein, and ordering her to show cause why the said motion should not be allowed; the said order also commanding the original defendants herein to file an answer which they, or any of them, might have to said motion within twenty days from the service of said order; and the said order, together with a copy of said motion, was duly served upon the original defendants herein, and upon the said Annie L. Cannon, one of the guardians of Anne Cannon Reynolds II."

Schenck, J., in Power Co. v. Yount; 208 N. C.. 182 (184), speaking to the subject of the law of the case, says: "The order consolidating the summary proceeding with the action instituted in behalf of other creditors; since it was made in conformity with the former opinion in this case, is binding upon the appellant and pretermits, if it does not preclude, any discussion of objections and exceptions thereto. 'A decision by the Supreme Court
158 on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.' Newbern v. Telegraph Co., 196 N. C., 14; Noble v. Davenport, 185 N. C., 162." Betts v. Jones, 208 N. C., 410 (411).

The record discloses that the Court below found that all parties in interest, whether in esse or in posse, present and prospective, were made parties and before the Court. Those of age and minors representing every vested or contingent interest and every class—the State of North Carolina, claiming its inheritance or succession taxes. All were made parties and by interplea became parties and filed fully their contentions. This case was tried in the Court below, as this Court when it was here, in its opinion said it should be tried. The Court below had full power and authority to hear and determine the contentions. In fact, the attorney for Annie L. Cannon, co-guardian of Anne Cannon Reynolds II, of long experience and learned in the law, wrote a letter on June 5, 1931, which is in the record: "Touching the question of the power of a court of equity to ratify and approve a contract affecting the interests of an infant in trust funds, etc., when made by properly constituted guardians, and upon suitable findings of fact; I beg to call your attention to the case of Bank v. Alexander, 188 N. C., 671-2. The discussion under paragraph three of the opinion involves precisely the principle which we are considering. This seems to be the only immediate decision in our courts upon the precise question of the affirmation of a contract such as we are considering, although a fuller investigation than I have had time to make may disclose some other case. The question of the power of a court to authorize a compromise in infants' rights in controversies over real estates or property is rather exhaustively considered in 33 A. L. R. 105 et seq., under an annotation dealing
159 alone with this subject. You will observe that the Supreme Court of the United States, as well as a number of states, unqualifiedly asserts the power of a court of chancery to deal conclusively in such matters and, by proper decree, to place the subject beyond any possible future attack." The law of this jurisdiction is well stated in this letter.

In the main opinion in In re Reynolds, supra, at p. 291, we find: "Courts of equity look with a jealous eye on contracts that affect materially, the rights of infants." Justice Brogden, in his con-

curring opinion, as quoted above, says at p. 296: "Both the history and traditions of equity as held and applied in this State demonstrate that it always lends an attentive ear to the call of widows, orphans, and minors, and in determining the bare right to be heard upon the merits of a proposition, it has not required the highest and most technical degree of proof." The best interest of the infants is the star (such as the wise men saw in the East and followed), which we must follow to guide us in determining this tangled controversy, so as to do justice to all and bring peace to a distressing family situation.

The facts more fully concerning all the aspects:

The will of R. J. Reynolds established a trust, providing for a certain share therein, of which his son, Zachary Smith Reynolds, was to be the first beneficiary. The provisions pertinent to the present case are as follows:

(a) Upon reaching the age of twenty-eight years, the said Zachary Smith Reynolds was to receive the corpus of said share, together with the accumulated income thereon.

(b) Before reaching the age of twenty-eight years, if the said Zachary Smith Reynolds died leaving a will, the trust continued for the benefit of his devisees until the time when the said Smith would have arrived at the age of twenty-eight years
160 (November 4th, 1939), whereupon the corpus of said trust share was to be turned over to said devisees.

(c) Before reaching the age of twenty-eight years, if Zachary Smith Reynolds died intestate, leaving issue, the trust was continued for the benefit of his children living at his death, until the time when he would have arrived at the age of twenty-eight years, whereupon the trust should cease and the said trust share should become vested in his children then surviving.

(d) Before reaching the age of twenty-eight years, if Zachary Smith Reynolds died intestate "without issue living at the termination of said trust," his share was to be held "on like trusts" for the surviving children of the testator (R. J. Reynolds) and the then living issue of the testator's deceased children per stirpes.

(e) If all the testator's children and their issue died before the termination of the trusts, one-half of the trust estate was to go to the testator's wife, Katharine S. Reynolds (Johnston), and the other half to the testator's brothers and sisters then living, and the descendants then living of any deceased brothers and sisters, per stirpes.

The will of Katharine S. Johnston also established a trust providing for a certain share therein of which her son, Zachary Smith Reynolds, was to be the first beneficiary. The provisions pertinent thereto are as follows:

(a) The trust continued during the life of said Zachary Smith Reynolds.

(b) Upon his death, the corpus of the trust share went to his devisees, by will; and, "in default of such appointment" to his descendants "living at his death," with an immaterial proviso as to a limited continuance of the trust with respect to Class A common stock of R. J. Reynolds Tobacco Company.

(c) In default of appointment by Zachary Smith
161 Reynolds, and in default of any descendants of his, the share in question was to be divided among "such of my husband, children, and descendants as are then living, per stirpes, and not per capita," the husband taking a child's part, the share of such children as were then living to be held by the trustee for them upon the same trusts that the original shares of the estate of the testatrix were then held.

During her life time the said Katharine S. Johnston by deed, also established a comparatively small trust creating a share, of which the said Zachary Smith Reynolds was the first beneficiary upon the same terms as those outlined in her will.

The Safe Deposit & Trust Company of Baltimore, was appointed Trustee in each one of the three trust instruments above described.

On July 29th, 1918, R. J. Reynolds died in Forsyth County. His will was properly probated. His estate was settled, and the residue thereof was turned over to the trustee, who has ever since acted in said capacity. The trustee holds separately the securities and personal property which constitute the share of which Zachary Smith Reynolds was the first beneficiary.

On December 29th, 1923, Katharine S. Johnston (formerly the widow of R. J. Reynolds) executed and delivered to said trustee a certain deed whereby she transferred and delivered to said trustee certain shares of stock in the R. J. Reynolds Tobacco Company to be held in trust for her four children, the share of Zachary Smith Reynolds was to be held in a trust similar to that outlined in her will above referred to.

On May 24, 1924, Katharine S. Johnston died. Her will was probated, her estate was settled, and the trustee now holds sepa-
rately the property, consisting of bonds, stocks, and secu-
162 rities, constituting the share of which Zachary Smith Reynolds was the first beneficiary, including the share of the individual estate of Katharine S. Johnston and the share of the property disposed of by her in the exercise of her power of appointment.

The judgment in the Court below modifies the original judgment entered on August 4th, 1931. In so doing, it approves a complete settlement of all beneficial interests in the trust shares here-

after mentioned, and also approves a settlement of a claim of the State of North Carolina for inheritance taxes thereon.

In re: Reynolds, supra, contains the decision of the Court upon a former appeal. Pursuant to that decision, the Cabarrus Bank & Trust Company, one of the guardians of Anne Cannon Reynolds II, duly filed its motion to set aside the original judgment herein, insofar as it purported to affect the rights of its ward.

(a) The filing of this motion led to negotiations for a submission to the Court of a proposal for a final settlement of all questions in reference to a distribution of the trust shares involved.

(b) These questions had already been raised by a suit instituted in Maryland on March 24th, 1933, by the Safe Deposit & Trust Company of Baltimore, the trustee under each of the three trusts involved. This suit is still pending. In it the Maryland Court is requested to assume jurisdiction of the said trusts, and to settle all questions in reference to the distribution of the shares in question.

(c) The proposed settlement is as follows:

(1) Two million dollars to the State of North Carolina in full settlement of all its claims for inheritance taxes.

(2) The trust fund of $500,000 heretofore established for the benefit of Anne Cannon Reynolds I by the original judgment herein to remain intact, with certain modifications as to its
163 disposition after the death of the said Anne Cannon Reynolds I. The amount of this trust fund is to be treated as a credit of $500,000 upon the 37½ percent allotted to Anne Cannon Reynolds II, provided for in subsection 4 hereof.

(3) 25 percent of the net trust shares to Christopher Smith Reynolds.

(4) 37½ percent of the net trust shares to Anne Cannon Reynolds II.

(5) 37½ percent of the net trust shares to Richard J. Reynolds, Mary Reynolds Babcock and Nancy Reynolds Bagley. In addition, there is to be paid to the Reynolds heirs the total sum of $750,000, which they intend to give to Elizabeth Holman Reynolds. The Reynolds heirs have formally expressed the intention of giving to a charitable Foundation in North Carolina the entire 37½ percent of the said trust shares allotted to them in the settlement.

The trusts in question were established by the will of R. J. Reynolds and the will and a deed of Katharine Smith Johnston. In this case, we are concerned only with that share in each of the three trusts of which Zachary Smith Reynolds was the first beneficiary.

Since the death of the trustors, and since the establishment of said trusts, several vital events have occurred which have given

rise to questions of unusual difficulty in reference to a final distribution of the trust shares of which Zachary Smith Reynolds was the first beneficiary. Some of the more important of said questions are as follows:

(1) The validity of the original judgment herein of August 4th, 1931: If this original judgment herein were held to be valid, it would entirely eliminate the infant, Anne Cannon Reynolds II, from participation in said trust shares. In such event, these shares would go either to Christopher Smith Reynolds or to the
164 Reynolds heirs, depending upon the result of other contingencies hereinafter stated. If, on the other hand, this original judgment were held to be void, Anne Cannon Reynolds II would get the entire trust shares, or one-half thereof, or none of them, depending upon the result of other contingencies hereinafter stated, and depending also, as to the shares in the R. J. Reynolds trusts, upon whether she was alive on November 4th, 1939.

(2) Validity of the Reno divorce: If this divorce were held to be invalid, it would effect the rights of Christopher Smith Reynolds, and the distribution of the said trust shares would likewise be affected. In that event, the said shares might go entirely to Anne Cannon Reynolds II, or might go entirely to the Reynolds heirs, depending upon subsequent contingencies and the answers to other questions herein outlined.

(3) Validity of alleged New York Will: The question as to the validity of this will involves a number of subsidiary questions, such as the capacity of a minor to change his domicil; the question as to whether Zachary Smith Reynolds really did change his domicile, even if he had the capacity to do so; and the further question as to whether, in any event, under a proper construction of the trust instruments, the appointive powers therein contained could be exercised by Zachary Smith Reynolds before he became twenty-one years of age. There might also be a question as to the law of what state would determine some of these questions.

If the alleged will were held to be valid, the Reynolds heirs might take the entire trust shares, to the exclusion of the two children of Zachary Smith Reynolds. On the other hand, if the alleged will were declared invalid, the ultimate distribution of said trust shares would depend upon the other uncertainties herein outlined.

(4) Death of either, or both, of the infants before
165 November 4th, 1939: It will be noted from subsection 7 of Item 4, of the will of R. J. Reynolds that if Zachary Smith Reynolds died intestate before reaching the age of twenty-eight years the trust share in question was continued for the benefit of his children living at his death until the time Smith would have arrived

at the age of twenty-eight years (November 4th, 1939), when the trust would then cease and the said trust shares would then become vested in his children then surviving. In other words, there were two points of time:

(a) Death of Zachary Smith Reynolds—as to income.

(b) November 4th, 1939—as to vesting of the corpus and accumulated income.

Hence, in the absence of any settlement, if either child died before November 4th, 1939, it, and its representatives, would lose all interest in the R. J. Reynolds trust—both income and corpus. In this respect the Reynolds trust differs from the Johnston trusts, the shares of which would be distributed immediately upon the death of Zachary Smith Reynolds.

The pleadings and the evidence before the Court when the present judgment was signed were entirely different from those before the Court when the original judgment herein was entered.

(1) At the time the original judgment was entered herein, the pleadings contained no allegations upon which it could be based, insofar as it attempted to affect the future rights of Anne Cannon Reynolds II in said trust shares. As stated in the opinion on the former appeal: "The complaint in said action sets out no controversy as to the property rights of the infant, Anne Cannon Reynolds II. There is no allegation as to any dispute in reference to the infant's contingent interests in said trust. No reason is alleged for seeking to alter or modify the terms of said
166 trusts, insofar as the infant, Anne Cannon Reynolds II, is concerned. No necessity is set forth for seeking to eliminate or change her interests in said trust."

The pleadings have been enlarged to embrace all the controversies connected with the distribution of said trust shares; and all parties having any present, future, or contingent interests therein have been made parties to the action.

(2) The existence of bona fide controversies: At the time of the entry of the original judgment Zachary Smith Reynolds was living. Hence there was not, and could not then be, any controversy in reference to the distribution of the said trust shares. Likewise, no question had then arisen as to the present or future rights of Anne Cannon Reynolds II in said trust shares. So far as she was concerned, there was nothing before the Court to form the basis of any settlement affecting her rights in said trust shares. Under these circumstances, the original judgment seems to have been entered hurriedly—without adequate investigation and consideration.

Now, the situation has completely changed. We not only have the precipitating fact of Smith's death, but we also have the exist-

ence of a number of vital questions forming the subject of bona fide controversies between the parties. These controversies relate to the validity of the original judgment herein, the validity of the Reno divorce, and its effect on Christopher Smith Reynolds; the validity of the New York will, and other subjects. None of these questions had arisen at the time of the original judgment. Each one of them vitally affects the distribution of the said trust shares.

The existence of these vital bona fide controversies furnishes a real basis and a compelling reason for a family settlement or compromise.

167 R. J. Reynolds left four children by his wife, Katharine S. Reynolds. After his death his widow (who is now dead) married J. Edward Johnston, and by that marriage she left a son, J. Edward Johnston, Jr. The wills of R. J. Reynolds and Katharine S. Reynolds (Johnston) and her deed in reference to the property rights of their four children are practically the same. These children were Richard J. Reynolds, Mary Reynolds Babcock, Nancy Reynolds Bagley, and Zachary Smith Reynolds. Richard J. Reynolds has reached the age of 28 years, and, under the wills and deed, his interest has become vested.

On April 30, 1934, as before set forth, in accordance with the opinion of this Court, the Cabarrus Bank & Trust Company, one of the guardians of Anne Cannon Reynolds II, filed a motion in the Superior Court of Forsyth County "to set aside the alleged judgment entered herein on August 4th, 1931, insofar as it attempts to affect the rights of said Anne Cannon Reynolds II in the trust estates created by her paternal grandparents, hereinafter more fully described, and in support of said motion, respectfully shows to the court as follows," etc.

On May 21, 1934, the Safe Deposit & Trust Co. of Baltimore, Trustee, filed an answer.

On May 21, 1934, Annie L. Cannon, co-guardian for Anne Cannon Reynolds II, filed an answer.

On Oct. 24, 1934, certain other defendants filed an answer. On Nov. 12, 1934, the State, which was allowed to interplead, filed an answer. On Nov. 15, 1934, an interplea of Christopher Smith Reynolds, infant, by his next friend, R. C. Vaughan, was filed.

On Nov. 16, 1934, Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, the only brother and sisters of Zachary Smith Reynolds (deceased) filed an offer of settlement and petition thereon. Responses were duly filed, all of which and more appear in the judgment in this cause.

168 Serious and grave questions of law and facts were raised. The judgment sets them out and we refer to same, all troublesome, but we will consider one for example: The validity

and effect of the alleged will executed in New York by Zachary Smith Reynolds, as a basis of the offer of the brother and sisters of Zachary Smith Reynolds.

Section 49 of the judgment is as follows: "That prior to his death, to wit: On or about August 21, 1931, the said Zachary Smith Reynolds executed an instrument in the form of a will complying with the law of the State of New York as to the execution of wills by residents of that State, and also complying with the requirements of C. S. 4131 as to the formalities for the execution of a will under the laws of the State of North Carolina, stating therein that he was a resident of Port Washington, Nassau County, in the State of New York; that in said paper the said Zachary Smith Reynolds undertook to execute the powers of appointment conferred upon him by the will of his father, R. J. Reynolds, and by the will and deed of his mother, Katharine S. Johnston, in favor of his brother, Richard J. Reynolds, Jr., and his two sisters, Mary Reynolds Babcock and Nancy Reynolds Bagley, to the practical exclusion of all other persons, including his then living child, Anne Cannon Reynolds II, and his then wife, Anne Cannon Reynolds I, which said will referred to and ratified the judgment in this cause under date of August 4, 1931, and made no further provision for Anne Cannon Reynolds II and Anne Cannon Reynolds I, other than a bequest of $50,000.00 to each of them." This matter was discussed in the opinion in re Reynolds, supra (206 N. C., at pp. 290–1).

The New York Statutes are as follows: Cahill's Consolidated Laws of New York (1930), Chap. 13, Sec. 10: "All persons, except idiots, persons of unsound mind, and infants, may devise
169 their real estate, by a last will and testament, duly executed, according to the provisions of this article." Section 15: "Every person of the age of eighteen years of upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing."

Item 7 of R. J. Reynolds' will (a like provision is in the will of Katharine S. Johnston) in part, is as follows: "Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said Trustee for the use and benefit of his or her devisees by will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees. * * * and, should any of my said children die without having made a testamentary disposition

of his or her share of my said estate and without issue living at the termination of said trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased children per stirpes; and, should all of my said children and their issue die before the termination of the trusts, then, in that event, one-half of the trust estate in value at that time, principal and income, shall go to and belong to my said wife, and the other half to my brothers and sisters then living and the descendants then living of any of my deceased brothers and sisters per stirpes."

Zachary Smith Reynolds attempted to execute a will leaving his property to his brother and sisters, as before stated. The brother and sisters make the offer of settlement. W. N. Reynolds, the uncle of Richard J. Reynolds, Mary Reynolds Babcock, Nancy Reynolds Bagley, and Zachary Smith Reynolds, and the great uncle of the two infants, Anne Cannon Reynolds II, and
170 Christopher Smith Reynolds, and all others who have contingent interests in their answer say: "They adopt and approve the proposals of settlement heretofore made and filed in this cause by the defendants, Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley." When Zachary Smith Reynolds made the will in New York, he was over eighteen years of age. The father and mother of Zachary Smith Reynolds, under their wills an l deed, gave him the right to will the property. This compromise judgment is not making a new will for R. J. Reynolds, but adjusting the differences brought about by his son, Zachary Smith Reynolds, attempting to do what under the wills and deed he had a right to do. Of course it had to be done legally. In the judgment is the following: "Sec. 60 (III). That the determination and settlement of the rights of all parties particularly including Anne Cannon Reynolds II and Christopher Smith Reynolds as herein decreed is just, fair, and equitable; that it is for the best interests of all parties, and of all the present, prospective or contingent beneficiaries of the three trusts hereinbefore mentioned; that such determination and settlement will substantially comply with the terms and conditions of the instruments creating said trusts, considering the changed situation and condition of said parties in relation to each other, and the contingencies and uncertainties as to which of said beneficiaries would be entitled to receive said trust estates, and in what proportion; that it will, to a large extent, prevent a dissipation and waste of a large part of the said trusts, and that it will accomplish the objects and effectuate the intention of the creators of said trusts."

We think, from the facts and circumstances of this case, that the above is correct—that the determination and settlement is "just, fair, and equitable."

In the present case new facts are set forth, the pleadings are enlarged to bring in all parties that have the remotest interest and sufficient allegations to cover every conceivable controversy, and the differences are vital and bona fide controversies. Paragraph 25 of the judgment is as follows: "That the parties to this proceeding are all properly before the Court; that either a next friend or a guardian ad litem has been duly appointed for each and every infant, whether born or unborn, who is now, or may hereafter be, in any way interested in the trust shares hereinafter mentioned; that all persons, whether minors or of age, and whether in esse or in posse, who are now, or who may hereafter be, interested in the trust shares hereinafter mentioned, have been made parties to this action, and have either appeared herein, or been duly served with process herein and with copies of all the foregoing pleadings."

Did the Court have the power and authority, under the facts and circumstances of this case, to rend r the judgment heretofore set forth? We think so. The able attorney for Annie L. Cannon, the co-guardian of Anne Cannon Reynolds II, thought a court of equity had such power, and in a letter heretofore set forth cited authorities. We quote from same: "In Bank v. Alexander, 188 N. C., 667 (671), we find: "The defendants excepted on the ground that the judgment is not binding upon the unborn contingent remaindermen. As we understand the record the contingent remaindermen are represented not only by the trustee, but by living members of their class, and under these circumstances the exception must be overruled. The question of law is discussed in the following cases and need not be repeated here. Ex parte Dodd, 62 N. C., 98; Overman v. Tate, 114 N. C., 571; Springs v. Scott, 132 N. C., 548; McAfee v. Green, 143 N. C., 411; Lumber Co. v. Herrington, 183 N. C., 85" Paragraph 3, pp. 671–2 thor-
172 oughly discusses the right of a Court of Chancery over infants and to settle controversies such as was done in the present case.

In Metzner v. Newman (224 Mich. 324) 33 A. L. R. 98 (accurately stated in the syllabus) we find: "When infant's property rights are involved in litigation, the general guardian or guardian ad litem may negotiate for a compromise of litigation, and, if the court approves it after an examination of the facts, the judgment or decree will be binding on the infants. When a chancery court has jurisdiction of the subject-matter and parties some of whom are infants, it may pass upon and adjudicate the rights and

equities of the infants, and the decree will be binding upon them. The adjustment of differences in a family over the settlement of estates will be favored even where infant legatees are interested, provided the proposed compromise of differences is submitted to the court and a finding made that the settlement and compromise are for the best interests of the infants. A finding by the Chancellor, with all the facts before him, that a will contest was in good faith, and that a compromise was for the best interests of infant legatees, will not be disturbed on appeal." At p. 105 we find: "This annotation is limited to compromises of contests over will or settlement of estates, and other contests relating to property in which infants are interested." (Annotation at p. 105.) "It has been held, however, in a number of cases, that the court has power to sanction compromises in the settlement of estates, or litigation generally, in which the property rights of infants are concerned," citing many authorities, including cases from U. S., Ill., Mass., Miss., Tenn., and numerous cases from England. Reynolds v. Reynolds, 208 N. C., 254.

In Spencer v. McCleneghan, 202 N. C., 662 (671) it is said: "We think those in esse or in posse are properly represented in this proceeding; all parties who could possibly have any interest in the estate are parties to this action and the infant and all unborn children who might have any interest, are properly represented. From a careful examination of the facts, as found by the court below and the judgment rendered, we think a court of equity has jurisdiction in the matter. We think the judgment fair to all and not prejudicial to the parties who have either vested or contingent interests. The policy of the law is to encourage settlement of family disputes like the present, so as to promote peace, good will and harmony among those connected by consanguinity and affinity. Equity favors amicable adjustments. * * * The court below found the facts at length with care, and rendered judgment that it was to the best interest of all that 'the terms and provisions of said contract * * * be accepted, ratified and approved and carried into effect.'" In the above case are cited many cases sustaining the above principle.

In Price v. Price, 133 N. C., 494 (504) Justice Henry G. Connor said: "The principles by which courts of equity are governed in sustaining and enforcing such contracts as to the one set out in this record are well settled and strongly stated by Lord Hardwicke in the case of Stapilton v. Stapilton, 1 Atk. 2 (2 White & Tudor's L. C., 1675, star p. 824). In speaking of a contract made for the purpose of settling a family controversy he says: 'It was to save the honor of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a court of equity to decree

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a performance of it, it ought to be done. * * * and, considering the consequence of setting aside this agreement, a court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family'."

In re Will of McLelland, 207 N. C., 375 (376), Chief Justice Stacy said: "Family settlements are to be commended (Tise
174 v. Hicks, 191 N. C., 609, 132 S. E., 560), and much is permitted to be done by consent of the parties," etc.

In the cases of Bank v. Alexander and Spencer v. McClelland, supra, each of these involved a trust in which there were future and contingent rights of infants, both in esse and in posse.

In Overman v. Tate, 114 N. C., 571 (574), cited in the Bank case, supra, we find: "In accordance with this policy it was laid down by Lord Hardwicke in the leading case of Hopkins v. Hopkins, 1 Atk., 590, that, 'If there are ever so many contingent limitations of a trust it is an established rule that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not in esse, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested'."

In 2 Pomeroy Equity (4th Ed.), Sec. 850, it is said: "Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations which are yet undetermined and uncertain, intentionally put an end to all controversy by a voluntary transaction by way of a compromise, are highly favored by courts of equity."

In 69 C. J., at page 1[illegible], we find the statement: "As a general rule, the beneficiaries under a will may validly contract with other interested persons in regard to their respective interests in the estate, and in this manner effectively compromise their claims, if they are conflicting, or else so divide or settle the estate that all are bound by the agreement. Such contracts, being in the nature of family settlements, they are usually favored by the
175 courts," citing a number of cases, including Spencer v. McCleneghan, supra.

A good statement of the rule, together with its limitations, is found in 65 C. J., pp. 683-4, as follows: "A court of equity has power to do whatever is necessary to preserve a trust from destruction, and, in the exercise of such power, it may, under some circumstances, modify the terms of a trust to preserve it. The court should have due regard for the intention of the settlor, and in exercising its jurisdiction, should be exceedingly cautious. The power of the court is exercised not to defeat or destroy the trust, but to preserve it. The exercise of the power can only be justified by some exigency

which makes the action of the court in a sense indispensable to the preservation of the trust, and in such cases, the court may, as far as may be, occupy the place of the settlor and do with the trust fund what the settlor would have done had he anticipated the emergency. The trust will not be modified in violation of the settlor's intention, merely because the interest of the parties will be served by doing so. Where a contingency arises, however, such that the estate may be totally lost to the beneficiaries, equity will not permit such loss for lack of power to modify the trust."

If the present settlement is rejected, and the parties relegated to long and exhaustive litigation, the primary purpose of the trusts in question will be defeated. By the present judgment, the primary objects of the trust are preserved. As is stated in the case of Curtiss v. Brown, 29 Ill., 201 (230): "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases, the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he antici-
176 pated the emergency. * * * From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence, that power is vested in the court of chancery."

The cases of Williams v. Williams, 204 Ill., 44, which is cited in the Spencer case, supra, and Wolf v. Uhlemann, 156 N. E., 334, which cites Williams v. Williams, are similar in principle to the present case.

Speaking of a chancellor, Black's Law Dictionary (3rd ed.) p. 308, says: "He is the general guardian of all infants, idiots, and lunatics, and has the general superintendency of all charitable uses, and all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the supreme court of judicature, of which he is the head. Wharton."

The Court of Chancery is a court having the jurisdiction of a Chancellor; a Court administering equity and proceeding according to forms and principles of equity.

Const. of N. C., Art. 4, sec. 1, in part, is as follows? "The distinctions between actions at law and suit in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action." etc. This section abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. Peebles v. Gay, 115

N. C., 38 (42). Under this section and Article IV, sec. 20, the Superior Courts became the successors of the Courts of Equity, having their jurisdiction and exercising their equitable powers unless restrained by statute. In re Smith, 200 N. C., 272, 274, Legal
177 and equitable rights and remedies are now determined in one and the same action. Woodall v. North Carolina Joint Stock Land Bank, 201 N. C. 428.

The able, careful and painstaking Judge sat in the Court below as a Chancellor—as general guardian of both infants. There existed a controversy between the two guardians of Anne Cannon Reynolds II. The two infants, Anne Cannon Reynolds, II and Christopher Smith Reynolds, as it were, are put in the "lap of the Chancellor." The Chancellor in the court of equity and conscience heard all the evidence. His jurisdiction was to hear and determine the cause and to enter judgment. The judgment which was entered is fully established by reason and authority. As to the equity of the settlement—we think all of the principles of equity and natural justice require that the issues existing between the parties be settled for all time, and that the parties should not be relegated to the litigation which is inevitable if the judgment of the Court below is reversed—and we think it should not be reversed. This seems to be the wish of all parties except one of the guardians (Annie L. Cannon, co-guardian of Anne Cannon Reynolds II), and the Safe Deposit & Trust Company of Baltimore, Trustee, which naturally wants to be protected on account of the trust funds held by it. The present judgment gives Anne Cannon Reynolds II, the infant, some $9,000,000. The former judgment of August 4, 1931, gave her only $2,000,000. This, at the time, was satisfactory to Annie L. Cannon, co-guardian of Anne Cannon Reynolds II, but not so with the other guardian—the Cabarrus Bank & Trust Co. It asked to be heard in a court of equity which was allowed. The differences between these guardians cannot affect the rights of these infants. May we be so bold as to quote an old adage: "When passion blows the breeze, let reason guide the helm." We think the Superior Court of Forsyth County had power and authority to hear and determine
178 the cause and had jurisdiction over the Trustee, which enabled the Court to proceed to judgment.

We do not think the appearance of the Trustee was special. In the original action herein, the Trustee entered a general appearance and filed an answer, from which we quote as follows: "It (the trustee) submits its rights, duties and discretion in the premises to the determination and decision of this Honorable Court." Thereafter, when the Cabarrus Bank & Trust Company filed its motion in Forsyth County to set aside the original judgment

herein, the trustee again, without any qualification, came in and filed an answer to said motion. The Reynolds heirs filed their petition, setting forth the offer of settlement, the trustee again came in and filed an answer to said petition, but in the beginning of the answer, for the first time these words appeared: "Specially appearing under protest, as hereinafter stated." An analysis of this last-mentioned answer, however, will show that the above-quoted words were not used for the purpose of entering a special appearance in the sense that the trustee was either denying or withholding its personal appearance, but the words were used for the purpose of insisting upon the contention that even with the trustee personally before the court, the court was without jurisdiction, because: "* * * all of the property and investments held in said three trusts is located in the State of Maryland, which is the sole situs of the administration of said trusts. Respondent (trustee) is advised, and therefore says, that the courts of said State alone have jurisdiction over the administration of said trusts, and that especially the Circuit Court of Baltimore, a court of said State having full equity jurisdiction, is the proper court to finally determine such questions as have arisen in reference to the administration of said trusts; and has, by virtue of the proceedings hereinbefore recited, already obtained specific jurisdiction to finally determine such questions."

179 In Buncombe County v. Penland, 206 N. C., 299 (304) we find: "If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general."

The trustee has personally appeared in this one action on three different occasions, to wit: (a) by filing an answer when the action was first instituted in August, 1931; (b) by filing an answer to the motion of the Cabarrus Bank & Trust Company to set aside the original judgment, and (c) by filing an answer to the petition of the Reynolds heirs setting forth the proposal of settlement. At no time has it taken the position that it itself was not personally before the Court. It has simply contended that the Court was without jurisdiction because the trust res was beyond the border of the State. This, of course, was not the entry of a special appearance insofar as personal jurisdiction over the trustee was concerned.

The record shows that the trustee has repeatedly acted upon the assumption that the trusts in question were being administered under the supervision of the Courts of this State. Whenever any question has heretofore arisen in reference to the administration of said trusts, such question has been referred to the Courts of this State for decision. We refer to the following instances:

(a) Upon the death of Katharine S. Johnston, a question arose as to the amount of net income distributable to each child of R. J. Reynolds after attaining the age of twenty-one years, and before attaining the age of twenty-eight years. This question involved a construction of the will of R. J. Reynolds. For a determination of this question, the trustee applied—not to the courts of Maryland—but to the courts of North Carolina. In order
180 to have said question determined, the trustee instituted an appropriate action in the Superior Court of Forsyth County, North Carolina, wherein said question was submitted to and determined by the court, a judgment settling this question being signed by Hon. Wm. F. Harding, Judge Presiding at the May, 1927, civil term of the Superior Court of Forsyth County. The judgment so rendered has ever since been complied with by the trustee in the administration of the trust.

(b) Thereafter, a further question arose in reference to the proper contruction of paragraph 6 of Item 4 of the will of R. J. Reynolds. For a decision of this question, an action was instituted in the Superior Court of Forsyth County by young R. J. Reynolds against the trustee and all the other trust beneficiaries, for the purpose of obtaining a construction of said paragraph of the will of R. J. Reynolds. In that action, the trustee filed an answer and a judgment was entered, from which an appeal was taken to the Supreme Court of North Carolina, by which the judgment was affirmed. Reynolds v. Trust Co., 201 N. C., 267.

(c) When this original action was instituted in August 1931, the trustee came in and voluntarily submitted itself to the jurisdiction of the Court. There was no qualification whatever to its appearance. Although the original judgment which was entered herein altered the terms of the trust instruments in a radical manner, the trustee raised no question as to the jurisdiction of the Court to enter such judgment. On the contrary, in a subsequent pleading, it states: "Your respondent was advised that this court did have jurisdiction and that all necessary parties were brought in to sustain such jurisdiction and make the judgment or decree which was passed valid and binding." After the entry of said original judgment, the trustee filed an itemized report showing in detail a compliance with said judgment.

181 The trusts in question are "resident trusts" of North Carolina, over which the Courts of this State have primary jurisdiction. For instance, the following facts are noted: (a) The wills creating the trusts were executed by persons who were residents of, and domiciled in, North Carolina. (b) These wills were probated in North Carolina. (c) The Corpus of the trusts consisted, and still consists, of intangible personal property, to wit: bonds and corporate stocks. (d) When said wills were

executed and probated, the beneficiaries of the trusts were residents of, and domiciled in, North Carolina. (e) Although it is true that a Maryland corporation is appointed trustee in each of the two wills in question, it is also true that each will (R. J. Reynolds and Katharine S. Johnston) gives to residents of North Carolina the power to change such trustee at any time. Hence, the Courts of this State have primary jurisdiction thereof.

In 1 Perry on Trust and Trustees (7th ed.), Sec. 71, p. 56, the following statement of the rule appears: "If a trust is created by the will of a citizen of a particular State, and his will is allowed by the Probate Court of that State, and a trustee is appointed by the Probate Court, courts of equity will have jurisdiction over the trust, although both the trustee and the property are beyond the jurisdiction of the Court. Chief Justice Bigelow, in determining this point, said: 'The residence of the trustee and cestui que trust out of the commonwealth does not take away the power of this court to regulate and control the proper administration of trust estates which are created by wills of citizens of this State, and which have been proved and established by the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will, and the right of the trustee to receive the trust fund is derived from the decree of the Probate Court. If the trustee is unfaithful or abuses his trust, that
182 Court has jurisdiction to remove him in concurrence with this court on the application of those beneficially interested in the estate.'"

In Swetland v. Swetland, 105 N. J. Eq. 608, 149 Atl. 50, at p. 52, the Court said: "The rule of law is well settled that the courts of the testator's domicile and of the state in which the will is probated have primary jurisdiction over testamentary trusts." McCullough's Executors v. McCullough, 44 N. J. Eq., 313; 14 A. 642; Marsh v. Marsh's Executors, 73 N. J. Eq., 99; 67 A. 706; Davis v. Davis, 57 N. J. Eq., 252; 41 A. 353; Murphy v. Morrisey & Walker, 99 N. J. Eq., 238, 132 A. 206; Hewitt v. Green, 77 N. J. Eq., 345, 77 A. 25; 65 C. J. 895.

The Safe Deposit & Trust Company of Baltimore, Trustee, acquired its title to the two testamentary trusts from testator's domiciled in North Carolina and solely by reason of the effect of their wills and the laws of this State. Whatever uncertainty may have existed on this question has been settled by four decisions of the Supreme Court of the United States. Farmers Loan & Trust Co. v. Minnesota, 280 U. S., 204; 74 L. Ed., 371; Baldwin v. Missouri, 281 U. S., 586; 74 Law Ed., 1056; Beidler v. S. C. Tax Commission, 282 U. S., 1, 75 Law Ed., 131; First National Bank of Boston v. Maine, 284 U. S., 312; 76 Law Ed., 313.

The cases involved the right of States other than that of the domicile of the decedent to levy inheritance taxes on intangible personal property. They include every form of intangible property. The tax was held void in each case under the due process clause of the Fourteenth Amendment on the ground that such property can be transferred in only one place and under one law. It may be conceded that tax cases frequently do not furnish a safe guide for the decision of questions involving jurisdiction,
183 but, since the decision in these cases are rested upon a concept of due process of law, there is no escape from the conclusion that they apply to all questions of transfer upon the event of death, and that such transfers occur in one place and under one law, and that judgments of the courts of that place define the instrument of title and give effect to the transfer of the property, which are entitled to full faith and credit in all of the States.

Elements of jurisdiction in this case: (1) Jurisdiction over the domicile of the creator of the trust and the instrument creating it. (2) Jurisdiction over one or more of the beneficiaries of the trust. (3) Jurisdiction over the whole or part of the property constituting the trust.

In this case the following classes of persons are represented by someone in esse: (1) Two claimants as issue of Zachary Smith Reynolds. (2) Three children of R. J. Reynolds and Katharine S. Johnston. (3) Grandchildren of R. J. Reynolds, the issue of his children who are now living. (4) A brother and sister of R. J. Reynolds. (5) Issue of the brothers and sisters of R. J. Reynolds. All possible classes who could be interested in the outcome of this case are represented.

We have read with care the able and exhaustive briefs of the Safe Deposit & Trust Company of Baltimore, Trustee, and that of Annie L. Cannon, co-guardian of Anne Cannon Reynolds II. We cannot sustain the contention made in their briefs. But Annie L. Cannon, co-guardian of Anne Cannon Reynolds II, in closing her brief, says: "She has sought to lay before the Court all the pertinent facts within her possession bearing upon the issues involved, and to call to the Court's attention the legal authorities governing same. She has the care and custody of this child and paramounts its interest and welfare above all else. She prays this Honorable Court, in the exercise of its sound judgment, to instruct her in the further performance of her duties."

184 In the judgment of compromise the State of North Carolina was awarded $2,000,000 in settlement of its inheritance tax claim. It seems as if the Safe Deposit & Trust Company of Baltimore, Trustee, alone appeals from the judgment. In the

brief of the Attorney General and his able Assistants, is the following: "There is still an open question in this State as to the basis of computation of the inheritance tax in cases where the property rights of the parties have been litigated and their interest determined by a compromise judgment. The holdings in other jurisdictions, where this question has arisen, are about evenly divided and contradictory. Note 78 A L. R., 716. In the most favorable aspect of the controversy, the State could not hope to be materially benefited by independently litigating the serious factual questions involved, either as to the amount or security of the tax and, therefore, the offer of compromise was accepted."

The brief of the Safe Deposit & Trust Company of Baltimore, Trustee, expressly waives all questions as to the imposition of the tax except the question of its constitutionality as being violative of the Fourteenth Amendment to the Federal Constitution. This suggested constitutionality is referred to two grounds: (a) That the imposition of the tax is by retroactive law, since R. J. Reynolds died before the enactment of the first State Revenue Act containing the applicable section of the law. (b) That the trust estate had no situs in North Carolina, and this State had, therefore, no taxing jurisdiction. The Attorney General and his Assistants, in an elaborate and carefully prepared brief, argue and cite authorities contrary to the view taken by the Safe Deposit & Trust Company of Baltimore, Trustee, and we agree with their view without setting same forth in detail.

N. C. Code of 1935 (Michie) 7880 (1) "Fifth. Whenever any person or corporation shall exercise a power of appointment
185 derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related and succeeded thereto by will of the donee of the power failing to

exercise such power, taking effect at the time of such omission or failure." Sec. 7880 (17)—the trustee to deduct tax.

In the former opinion of this court (206 N. C., 276-290) on the appeal of the Cabarrus Bank & Trust Company, co-guardian of Anne Cannon Reynolds II, we said in the main opinion: "The alleged will of Zachary Smith Reynolds appears to be inoperative and void. The wills and deed of the parents of Zachary Smith Reynolds gave him the right to make a will—exercising the power of appointment given him was one of the serious and bona fide questions that brought about the compromise. He made the will in controversy to his brothers and sisters, who made the 'offer of settlement.'"

But, however conclusive the arguments as to the legality and constitutionality of the tax, we do not need to rely on the strict application of these legal principles to sustain the judgment of the Court below, affirming the tax. It was a settlement by
186 compromise and agreement in a matter which was a legitimate subject of compromise, in a Court of competent jurisdiction, with all the parties affected represented. The appeal is by the Trustee alone in this case, all the cestui que trustent having agreed, could only properly raise the propriety of the action of the Chancellor in advising the guardians of infant parties, and in approving the compromise.

A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provision may be taxed. State v. Scales, 172 N. C., 915. See also Norris v. Durfey, 168 N. C., 321. Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation. Norris v. Durfey, supra., "The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law." Brown, J., in Re Morris, Estate, 138 N. C., 259, cited and approved in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C., 263, 267. See Waddell v. Doughton, 194 N. C., 537.

In the judgment is the following: "60 (f). Upon a thorough and complete consideration of all the facts and circumstances relating to the claim of the State of North Carolina for said taxes, the court finds as a fact that the settlement of the taxes herein referred to is for the best interest of all parties concerned, in-

cluding the infants Anne Cannon Reynolds II and Christopher Smith Reynolds, and said settlement is hereby fully approved by the court, and the guardians of said infants are hereby
187 advised, instructed, authorized, and empowered to participate in said settlement on behalf of said infants, and it is hereby ordered and decreed that the Safe Deposit & Trust Company of Baltimore, Trustee, out of said trust funds, pay to the State of North Carolina, the sum of two million dollars in full settlement of any and all claims or demands which the State now has, or may hereafter have, by reason of the things and matters set forth in the intervening complaint herein, such payment to be made solely out of the trust estates created by the will of R. J. Reynolds and the will and deed of trust of Katharine S. Johnston, of which Zachary Smith Reynolds was the first beneficiary in proportion to their respective values as of the date of this decree, and nothing herein to impose any personal liability upon any of the parties to this action. That the said sum of $2,000,000.00 is to be paid to the State of North Carolina when and if this decree becomes effective, and shall be in full settlement of any and every claim of the State of North Carolina for inheritance taxes, penalties, and interest."

Under the facts and circumstances of this case, we think the settlement of taxes correct. The Court below in the judgment (1) says: "That the original judgment entered herein on August 4, 1931, be, and it hereby is, modified as follows," etc., and sets forth wherein it is modified. We think all this was done in compliance with the former opinion of this Court In re Reynolds, supra.

Frequently on changed conditions, equity steps in and gives relief. In Starkey v. Gardner, 194 N. C., 74, it was in regard to restrictive covenants in deeds. In Raleigh v. Trustees of Rex Hospital, 206 N. C., 485, equitable relief was granted on account of changed conditions and the board of trustees of Rex Hospital was permitted to borrow money by giving a lien on the property to remodel present building or erect new building. In the Curtiss case, supra, we repeat "From very necessity a power
188 must exist somewhere in the community to grant relief in such cases of absolute necessity and under our system of jurisprudence that power is vested in a Court of Chancery."

All the facts are fully, elaborately, and carefully set out in the record and the judgment which we set forth above, covering every aspect of the controversy. Due care has been taken in so important a controversy, where the property rights of infants are concerned, to set forth all the facts in the case. We think there was sufficient evidence to support the findings of fact in the Court below on the different aspects of the controversy.

The Court below found the compromise, as embodied in the judgment appealed from, fair, just, and equitable in regard to the property rights of these infants and all parties who had an interest contingent or otherwise. The Court below had power and authority to render the judgment. In this jurisdiction the Courts, for perhaps a hundred years, have upheld family settlements, and the general policy of the Courts has been to encourage compromise of litigation. In regard to infants, this power and authority is lodged in the Chancellor in a Court of equity. It seems as if justice and righteousness to the infants and all parties has been embodied in the judgment, and should bring peace and harmony. We do not think that any of the exceptions and assignments of error made by the appealing parties can be sustained.

It is the duty of both of these guardians to set up this judgment in the suit now pending in the Circuit Court of Baltimore, Maryland, heretofore mentioned.

For the reasons given, the judgment of the Court below is Affirmed.

189 In Supreme Court of North Carolina

Fall Term 1935. No. 746—Forsyth County

ANNE CANNON REYNOLDS, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, J. F. CANNON, AND ANNE CANNON REYNOLDS II, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, HOWARD RONDTHALER

vs.

ZACHARY SMITH REYNOLDS, A MINOR, W. N. REYNOLDS AND R. E. LASATER, GENERAL GUARDIANS OF SAID MINOR, ZACHARY SMITH REYNOLDS; SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE AS TRUSTEE UNDER THE WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, RICHARD J. REYNOLDS, MARY REYNOLDS BABCOCK, CHARLES BABCOCK, NANCY REYNOLDS BAGLEY, HENRY WALKER BAGLEY, W. N. REYNOLDS AND R. E. LASATER, GUARDIANS OF NANCY REYNOLDS BAGLEY, HARDIN W. REYNOLDS, ETHEL R. REYNOLDS, SUE R. STALEY, THOMAS STALEY, A. D. REYNOLDS, GRACE REYNOLDS, HOGE REYNOLDS, SCOTTIE REYNOLDS, R. S. REYNOLDS, LOUISE REYNOLDS, CLARENCE REYNOLDS, EDNA REYNOLDS, NANCY L. LASATER, R. E. LASATER, LUCY L. STEDMAN, J. P. STEDMAN, MARY LYBROOK, SAM LYBROOK, WILL LYBROOK, D. J. LYBROOK, CHINA LYBROOK, ANNIE D. REYNOLDS, HARDIN W. REYNOLDS, KATHERINE REYNOLDS, WILLIAM N. REYNOLDS, LUCY R. CRITZ, W. N. REYNOLDS, KATE B. REYNOLDS, J. EDWARDS JOHNSTON, J. EDWARD JOHNSTON, JR., J. EDWARD JOHNSTON, GUARDIAN OF J. EDWARD JOHNSTON, JR.

Judgment

This cause came on to be argued upon the transcript of the record from the Superior Court of Forsyth County—upon con-
190 sideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Heriot Clarkson, Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed.

And it is considered and adjudged further that Annie L. Cannon, Guardian, and Safe Deposit & Trust Company of Baltimore do pay the costs of the appeal in this Court incurred, to-wit, the sum of One Hundred Thirty Six and 60/100 dollars ($136.60), and execution issued therefor.

A True Copy.

[SEAL] EDWARD MURRAY,
Clerk of the Supreme Court.

In the Superior Court, Forsyth County, North Carolina

ANNE CANNON REYNOLDS, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, J. F. CANNON, AND ANNE CANNON REYNOLDS II, A MINOR, ACTING BY AND THROUGH HER NEXT FRIEND, HOWARD RONDTHALER

vs.

ZACHARY SMITH REYNOLDS, A MINOR, W. N. REYNOLDS AND R. E. LASATER, GENERAL GUARDIANS OF SAID MINOR, ZACHARY SMITH REYNOLDS, SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE, AS TRUSTEE UNDER THE WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, RICHARD J. REYNOLDS, MARY REYNOLDS BABCOCK, CHARLES BABCOCK, NANCY REYNOLDS BAGLEY, HENRY WALKER BAGLEY, W. N. REYNOLDS AND R. E. LASATER, GUARDIANS
191 OF NANCY REYNOLDS BAGLEY, HARDIN W. REYNOLDS, ETHEL R. REYNOLDS, SUE R. STALEY, THOMAS STALEY, A. D. REYNOLDS, GRACE REYNOLDS, HOGE REYNOLDS, SCOTTIE REYNOLDS, R. S. REYNOLDS, LOUISE REYNOLDS, CLARENCE REYNOLDS, EDNA REYNOLDS, NANCY L. LASATER, R. E. LASATER, LUCY L. STEDMAN, J. P. STEDMAN, MARY LYBROOK, SAM LYBROOK, WILL LYBROOK, D. J. LYBROOK, CHINA LYBROOK, ANNIE D. REYNOLDS, HARDIN W. REYNOLDS, KATHERINE REYNOLDS, WILLIAM N. REYNOLDS, LUCY R. CRITZ, W. N. REYNOLDS, KATE B. REYNOLDS, J. EDWARD JOHNSTON, J. EDWARD JOHNSTON, JR., J. EDWARD JOHNSTON, GUARDIAN OF J. EDWARD JOHNSTON, JR.

Judgment

This cause coming on to be heard and being heard before His Honor J. H. Clement, Judge Presiding at the January 6 Term 1936 of the Superior Court of Forsyth County, and it appearing to the Court that there was an appeal to the Supreme Court of North Carolina from the judgment rendered in this cause by this Court at the March Special Term 1935, and that said judgment has been affirmed by the Supreme Court as evidenced by the certified copy of the opinion and judgment of the Supreme Court which is on file in the office of the Clerk of this Court;

It is, therefore, ordered and adjudged that the original judgment heretofore entered at the March Special Term 1935 of this Court be and the same is hereby affirmed in every respect in conformity with the judgment and opinion of the Supreme Court, and that it is the final judgment of this Court, except that the cause is retained for the purpose of permitting the guardians or other representatives of minor parties to this cause and the attorneys for any such parties to file petition for allowance
192 or compensation to be fixed by the Judge of this Court; that the costs incurred in this Court be taxed as provided in said original judgment.

This the 10th day of January 1936.

J. H. CLEMENT, *Judge Presiding.*

193 Supreme Court of the United States

Order allowing certiorari

Filed October 27, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

194 In Supreme Court of the United States

Stipulation as to record on writ of certiorari

Filed Nov. 25, 1941

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on writ of certiorari

to the Circuit Court of Appeals for the Fourth Circuit granted October 27, 1941, the printed record may consist of the following:

1. The material contained in the printed transcript of record (consisting of 74 pages) used for the purposes of the petition for writ of certiorari herein.

2. The following excerpts from the printed volume entitled "Records and Proceedings in the Superior Court of Forsyth County and in the Supreme Court of North Carolina in a Civil Action Entitled: Ann Cannon Reynolds, et al. vs. Zachary Smith Reynolds, et al." which is contained in the certified transcript of record before this Court in this proceeding:

195 (a) Will of R. J. Reynolds found at pages 305 to 347, inclusive, of that printed volume.

(b) Will of Katharine S. Johnston found at pages 335 to 348, inclusive, of that printed volume.

(c) Deed of Katharine S. Johnston found at pages 352 to 357, inclusive, of that printed volume.

(d) The findings and opinion of the Supreme Court of North Carolina, etc., found at pages 711 to 794, inclusive, of that printed volume.

3. This stipulation.

It is further agreed that in the briefs for either party reference may be made to any portions of the transcript of record which is not included in the printed record prepared as aforesaid.

CHARLES FAHY,
Charles Fahy,
Solicitor General of the United States.

Dated this 21 day of November 1941.

CHARLES MCH. HOWARD.
Charles McH. Howard,
Counsel for Respondent.

Dated this 22 day of November 1941.

[Endorsement on cover:] File No. 45928. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 600. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Safe Deposit and Trust Company of Baltimore, Trustee under Wills of R. J. Reynolds and Katharine S. Johnston, etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed September 10, 1941. Term No. 600 O. T. 1941.

U. S. GOVERNMENT PRINTING OFFICE, 1942

No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHERINE S. JOHNSTON, AND DEED OF KATHERINE S. JOHNSTON AND DECREE OF SUPERIOR COURT FOR FORSYTH COUNTY, N. C., ETC., AND ESTATE OF ZACHARY SMITH REYNOLDS, DECEASED, ESTATES ADMINISTRATION, INC., ADMINISTRATOR, D. B. N.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, AND DEED OF KATHARINE S. JOHNSTON AND DECREE OF SUPERIOR COURT FOR FORSYTH COUNTY, N. C., ETC., AND ESTATE OF ZACHARY SMITH REYNOLDS, DECEASED, ESTATES ADMINISTRATION, INC., ADMINISTRATOR, D. B. N.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled causes on June 10, 1941.

OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 1–46) are reported at 42 B. T. A. 145. The opinion of the Circuit Court of Appeals (R. —) is reported at 121 F. (2) 307.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 10, 1941 (R. —). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Decedent was the beneficiary of three trusts created by his parents. During the decedent's life, the income of each trust was either to be paid to him or to be accumulated. At his death, the property was to go to the person or persons to whom the decedent, in his sole discretion, might appoint by will. In default of appointment, the property of each trust was to go to his descendants or, if none, to his brother and sisters. Under the terms of one of the trusts, decedent was to receive the corpus outright upon attaining the age of 28. Decedent died at the age of 20 without having validly exercised his powers of appointment. Did the decedent at the time of his death have such an "interest" in the trust property as to require its inclusion in his gross estate under Section 302 (a) of the Revenue Act of 1926?

2. The decedent left a will by which he sought to appoint the trust property to his brother and sisters. The validity of the will was challenged and the will has never been probated. The decedent's brother and sisters, asserting a right to take as appointees under the will as well as a right to take under the gift-over provisions of the trusts if the will was invalid, obtained a substantial share of the trust property pursuant to a judicially approved compromise. Is all or any part of the amount obtained by the brother and sisters in settlement to be considered as having passed under exercised powers of appointment and therefore includible in decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * *
>
> (f) [as amended by Section 803, Revenue Act of 1932, 47 Stat. 169] To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed

executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth;

* * * * *

(U. S. C., Title 26, Sec. 411.)

The applicable Treasury Regulations will be found in the Appendix, *infra*, pp. 23–24.

STATEMENT

The facts, insofar as relevant to the two issues raised in the court below and presented by this petition,[1] are not in dispute. They may be summarized as follows:

1. *Facts with respect to the first issue.*—Decedent was the beneficiary of three trusts, one created under the will of his father in 1918, one

[1] Many contentions which the Government advanced before the Board, and which are discussed in the Board's opinion (R. 17–46), were abandoned in the court below. In that court, the Government pressed only the two questions with respect to which writs of certiorari are now sought (R. —).

created by deed of trust executed by his mother in 1923, and one created by will of his mother in 1924. Under the trust created by his father, decedent was to receive only a portion of the income until he reached the age of 28, the remainder of the income to be added to the corpus of the trust. Upon attaining the age of 28, he was to receive the trust property outright, together with all accumulated income. Under the trusts created by his mother, decedent was to enjoy the income of the property for life, with certain restrictions as to the payment of income to him before he attained the age of 28. Any income not paid to him or for his benefit before he reached 28 was to be added to the *corpora* of the trusts. No one other than decedent had any right to or interest in any of the trust income during decedent's life. (R. 3–7; Supp. 310–311, 342–343, 354.)[2]

In the case of all three trusts, decedent was given a general power of appointment over the trust property, exercisable by will in favor of any person or persons he might in his sole discretion select. In default of the exercise of the power of appointment, the trust property was to go to decedent's descendants, if any, or if he had no descendants to his brother and sisters and their issue *per stirpes*. (R. 3–7.)

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[2] The reference to "Supp." is to a bound volume of the record and proceedings in the case of *Reynolds* v. *Reynolds*, 208 N. C. 578. This bound volume forms part of the record in the present case and has been filed with the Clerk of this Court.

Decedent died on July 6, 1932, about four months before he would have attained the age of 21. He was domiciled in North Carolina and, under the laws of that state, was incapable of disposing of property by will because of his minority. (R. 7, 31.)

2. *Additional facts with respect to the second issue.*—Decedent was twice married, first, to Anne Cannon and thereafter to Libby Holman. He left surviving him a child by the first marriage, Anna Cannon Reynolds II, and a posthumous child by the second marriage. (R. 9, 10, 12.)

After decedent had been separated from his first wife, he entered into a settlement with her, by which trust funds of $500,000 each were set up for the wife and child. The judgment embodying this settlement barred the wife and child from making any further claims for financial support against the decedent and from any participation in the trust property. Subsequently, on November 23, 1931, Anne Cannon Reynolds obtained a divorce at Reno, Nevada. Six days later decedent married Libby Holman. (R. 9–10.)

A few months before his divorce, decedent, while temporarily staying in New York, executed a purported will with three witnesses, in which he attempted to exercise his powers of appointment in favor of his brother and sisters. In this will, decedent declared that he had adopted and acquired a domicile in New York and that he intended to make it his permanent home. (R. 10.)

After decedent's death, claims were asserted to the trust property by the Cannon child, by the Holman child, and by the decedent's brother and sisters (R. 12–15). The validity of the decedent's divorce from Anne Cannon, the validity of the judgment barring Anne Cannon and her child from participation in the trust property, and the validity of the New York will were all contested issues (R. 12–13). Decedent's brother and sisters urged that they were entitled to the trust property because the New York will was valid and in that will decedent had exercised his powers of appointment in their favor.[2] They further urged that, even if the New York will was invalid, they were entitled to the trust property under the gift-over provisions of the trusts. This contention was based on the theory that the Cannon child was excluded from taking because of the judgment embodying the settlement and that the Holman child was excluded from taking because decedent's divorce from Anne Cannon was invalid and the Holman child therefore illegitimate (R. 13).

Extensive litigation ensued in the North Carolina state courts to determine the validity of the various claims to the trust property. See *In Re Reynolds*, 206 N. C. 276; *Reynolds* v. *Reynolds*, 208 N. C. 578. A compromise was finally reached

[2] Evidence that this contention was made is contained in the opinion of the Supreme Court of North Carolina approving the compromise. *Reynolds* v. *Reynolds*, 208 N. C. 578, 618, 630; Supp. 770, 787.

under which, after the payment of $2,000,000 to the State of North Carolina in compromise of its claim for inheritance taxes, 37½ percent of the remainder was allotted to Anne Cannon Reynolds, II, 25 percent was allotted to the Holman child, and 37½ percent was allotted to the brother and sisters of the decedent to be held in trust for them pursuant to the terms of their father's will; $750,000 was paid to the brother and sisters to be turned over to Libby Holman. (R. 13–15.) The North Carolina Superior Court confirmed the compromise and its judgment was affirmed by the North Carolina Supreme Court. *Reynolds* v. *Reynolds*, *supra*.

The Safe Deposit & Trust Company of Baltimore, trustee of each of the trusts, had instituted equity proceedings in the Circuit Court of Baltimore City, seeking protection with respect to any distribution of the trust property. After all interested parties, including the executor named in the New York will, had been brought in, that court entered a decree affirming the compromise which the North Carolina court had approved and directing that it be carried out. The executor named in the New York will subsequently was discharged from any duty to probate the will in New York or defend it in the Maryland proceedings (R. 16).

3. *Action of the Commissioner.*—The estate tax return filed on behalf of decedent's estate did not

include any part of the trust property in the gross estate. The Commissioner determined that the entire value of the trust property should be included and accordingly assessed a deficiency in estate tax of $8,520,820.55, less any credit for inheritance taxes paid to the State of North Carolina (R. 2).[4] The Board of Tax Appeals held this action of the Commissioner to be erroneous (R. 47). The Commissioner appealed, limiting his appeal to the two questions on which review by this Court is sought. The court below rejected the Government's contentions on both issues and affirmed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that decedent did not have an interest in the corpus of each of the trusts created for him by his parents which was taxable as part of his gross estate under Section 302 (a) of the Revenue Act of 1926.

2. In holding that no part of the corpus of the trusts should be included in gross estate under Section 302 (f) of the Revenue Act of 1926, as amended, as having in effect passed under a power of appointment exercised by decedent.

3. In affirming the decision of the Board of Tax Appeals.

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[4] Since $2,000,000 was paid to the State of North Carolina for inheritance taxes, the principal amount of the deficiency is approximately $6,520,000, with interest to date of approximately $3,155,000, or a total of approximately $9,675,000.

REASONS FOR GRANTING THE WRIT.

1. The present case is one of large importance in the administration of the revenue laws. Although the litigation is unusual because of the sizable amount of the taxes at stake (approximately $9,675,000), the importance of the case derives more particularly from the similarity of the Reynolds trusts to innumerable other trusts, in which property of incalculable value has been placed, the taxability of which will be affected by the decision here.

The outstanding characteristic of the Reynolds trusts for present purposes is that they combine a life estate,[5] a testamentary power of disposition in the life beneficiary, and a gift-over provision in favor of the life beneficiary's children and next of kin in the event of non-exercise of the power of appointment. Trust provisions of this type are in constant use. They are designed to confer upon the life beneficiary all the substantial attributes of ownership of the trust property, except the power of alienation during his lifetime, while still withholding from him technical legal title to the property.

The court below held that this device successfully avoids the impact of the estate tax law. The

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[5] One of the trusts was to terminate when the decedent reached the age of 28, at which time he was to be given the corpus outright. Under the provisions of this trust, the decedent had more than a life estate; he had in effect ownership of the property, possession merely being postponed until he reached 28.

court reasoned that Congress, in enacting Section 302 (a) of the Revenue Act of 1926, intended to tax only the devolution of legal estates in property, that decedent's various rights in and to the trust corpora, however substantial and however similar to the rights of ownership, did not confer legal title upon the decedent, and that therefore the decedent could not be considered as having an "interest" in the property within the meaning of Section 302 (a).

The effect of this decision, with its emphasis upon technical considerations of property law rather than upon the substance of decedent's rights, is to sanction a method by which ownership benefits can be enjoyed by a decedent during his life without the imposition of corresponding estate tax obligations upon his death. Unless reversed by this Court, the decision will have a far-reaching effect upon the revenues, since it will remove from the scope of the estate tax all property subject to trusts of this kind, when the power of appointment is not exercised, irrespective of the nature and extent of the decedent's actual control over the property. A construction of a basic provision of the estate tax law which has such results should, we believe, be reviewed by this Court.

2. This is the first case in which the Government has sought to apply Section 302 (a) to a trust of the type here involved. There is, there-

fore, no direct conflict between the decision of the court below and any decision of this Court or of any other circuit court of appeals. But the construction which the court below placed upon Section 302 (a), and the method of reasoning by which it sought to justify that construction, are so squarely opposed in theory to many recent decisions of this Court in analogous situations as to justify the assertion that a conflict in principle exists.

There can be no dispute that decedent in this case had almost all the substantial attributes of ownership of the trust property. All the income was either to be paid to him currently or accumulated; upon attaining the age of 28 he would receive the corpus of one trust outright and beginning then and continuing for the rest of his life he would receive the entire income of the other two. At the moment of his death he possessed a general power to dispose of the trust property and all accumulated income to whomsoever he chose, including his own estate or creditors. If he failed to exercise the power, the property would pass to his next of kin—his children for whom it was his moral obligation to provide, or, if none, his brother and sisters. It is apparent, therefore, that decedent, to the exclusion of all other persons, could enjoy the fruits of the trust properties and dispose of their substance at his death. His

position differed from that of an absolute fee owner only in that his ownership was subject to spendthrift provisions—restraints on alienation during his first 28 years (or, as to two trusts, during his life), and partial limitations on enjoyment of the income during his first 28 years. But at the moment of his death decedent's situation could not be distinguished from that of a legal fee owner, for his unlimited power of disposition at that moment gave him all the rights which a holder of an absolute fee title would have had.

The question before the court below was whether these substantial attributes of ownership which decedent possessed constituted an "interest" in the property "at the time of his death" within the meaning of Section 302 (a). The court answered this question in the negative, not on the ground the decedent's rights in and to the property were substantially less than those of a fee owner, but on the ground that the term "interest" refers to a technical common-law estate in property and that decedent had no such estate. The court made no attempt to show why Congress would have wanted to draw a distinction for tax purposes between an owner of property and a person having the same rights of enjoyment and disposition as an owner, although not his legal title. In the view of the court, it was decisive that no single one of the decedent's rights, considered separately, amounted to a common-law estate.

The approach thus taken by the court below is irreconcilable in several respects with recent rulings of this Court. In the first place, the refusal of the court to regard the "bundle of rights" which the decedent had in the property as a whole, and its emphasis instead upon the characteristics of each of the rights separately, is directly contrary to the approach taken by this Court in *Helvering* v. *Clifford*, 309 U. S. 331, where the grantor of a short-term trust, of which the grantor's wife was beneficiary, was held to be taxable on the trust income because of the many attributes of ownership which he had retained. The Court specifically pointed out that "no one fact is normally decisive" and "that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership * * *." 309 U. S. at 336.

In the second place, and of more importance, the court below completely disregarded the fundamental rule enunciated by this Court in the *Clifford* and many other cases[*] that one who is substantially the owner of property is to be treated as its owner for tax purposes, even though

[*] *Helvering* v. *Horst*, 311 U. S. 112; *Harrison* v. *Schaffner*, 312 U. S. 579; *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42–43; *Burnet* v. *Guggenheim*, 288 U. S. 280, 283; *Burnet* v. *Wells*, 289 U. S. 670; *Chase National Bank* v. *United States*, 278 U. S. 327, 338.

he may not have legal title thereto. This rule is based on the unassailable assumption that Congress, in enacting the revenue laws, intends tax consequences to depend upon the substance of things and not upon the "niceties of the law of trusts and conveyances." *Helvering* v. *Clifford, supra,* at 334. The premise upon which the court below proceeded, however, was precisely the reverse: it assumed that Congress referred in Section 302 (a) only to a technical common-law estate and accordingly considered irrelevant the substantiality of decedent's rights of enjoyment in and powers of disposition of the trust property.

Had the court below followed the mandate of this Court to look to the substance of things, its ruling would, we believe, necessarily have been different. This Court has frequently stated that "for purposes of taxation, a general power of appointment * * * [is] equivalent to ownership of the property subject to the power" (*Curry* v. *McCanless,* 307 U. S. 357, 371, and cases cited; *Graves* v. *Elliott,* 307 U. S. 383, 386), and that "to make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." *Chase National Bank* v. *United States,* 278 U. S. 327, 338; *Bullen* v. *Wisconsin,* 240 U. S. 625, 630. Further, the Court has specifically pointed out that "the non-exercise of the power may be as much a disposi-

tion of property testamentary in nature as would be its exercise at death." *Chase National Bank* v. *United States, supra,* at 338.[7]

Under these authorities, it is entirely plain that decedent "at the time of his death" had an "interest" in the trust property equivalent in all but legal formalism to that of an owner in fee. And under the *Clifford* and similar cases, such an interest requires that the decedent be treated, for tax purposes, as though he were in fact the owner. The failure of the court below so to regard him cannot, we believe, be harmonized with the decisions which we have cited.

Nothing in the structure, judicial interpretation,

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[7] Although taxpayer, who died at the age of twenty years and eight months, was prevented by Section 4128, North Carolina Code (1931), from passing property by will until he reached twenty-one, his disability was not different than it would have been if he had owned the property absolutely. The limitation was not one inhering in decedent's basic power over the property at the moment of death, but was one superimposed by the law of the state which happened to be his domicile at death. See Restatement of the Law of Conflict of Laws, Section 287; Beale, Conflict of Laws (1935 Ed.), Vol. 2, Section 287.1, pp. 1010–1011. An appropriate change in the North Carolina law or removal of domicile to a state permitting a valid will at an earlier age could have overcome the obstacle of decedent's disposition by will. In more than half of the states a married male of eighteen or over can make a valid will of personalty; in some states ages ranging down to fourteen are sufficient. Schouler, *Wills, Executors, and Administrators* (6th ed.), Vol. 1, Section 77.

or legislative history of the estate-tax law justified the court below in departing from the principles of construction enunciated by this Court. *United States* v. *Field*, 255 U. S. 257, the principal authority upon which the court below relied, interpreted Section 202 (a) of the Revenue Act of 1916 which described only an interest of the decedent—

> which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. (255 U. S. at 262.)

The court below was apparently unmoved by the significant fact that the quoted words were deleted by Section 302 (a) of the 1926 Act, which is the provision here applicable. The court below was also influenced by the partial overlapping between Section 302 (a) and Section 302 (f) of the 1926 Act, which would result from the construction which we urge. But this Court has frequently refused to limit the scope of a general provision in a tax statute simply because of the subsequent addition of a specific provision covering part of the same ground. *Helvering* v. *Clifford*, 309 U. S. 331; *Higgins* v. *Smith*, 308 U. S. 473; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Burnet* v. *Guggenheim*, 288 U. S. 280; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 45

note.[8] The provision which is Section 302 (a) of the 1926 Act first appeared in 1916 (Section 202 (a) of the 1916 Act); the provision which is Section 302 (f) of the 1926 Act first appeared in 1918 (Section 402 (e) of the 1918 Act) and, in the words of the Committee report, was added to the law "for the purpose of clarifying rather than extending the existing statute." H. Rept. No. 767, 65th Cong., 2d sess., p. 21. It will be noted, too, that in 1926, after the addition of this "clarifying" specific provision, Section 302 (a), the basic provision, was considerably broadened by the deletion of the qualifying words which are quoted above and which formed the principal basis of the *Field* decision. This broadening of the general provision some years after the introduction of the specific one is an especially strong reason why the construction of the general provision should not be affected by the existence of the specific one.[9]

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[8] Cf. *Douglas* v. *Willcuts*, 296 U. S. 1, 10; *White* v. *Higgins*, 116 F. (2d) 312 (C. C. A. 1); *McCauley* v. *Commissioner*, 44 F. (2d) 919, 920 (C. C. A. 5); *O'Donnell* v. *Commissioner*, 64 F. (2d) 634, 635 (C. C. A. 9), certiorari denied, 290 U. S. 699.

[9] The court below was also influenced by cases like *Helvering* v. *Grinnell*, 294 U. S. 153; *Morgan* v. *Commissioner*, 309 U. S. 78; *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4); and *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. (2d) 758 (C. C. A. 3). But these cases are not precedents in any way decisive of the present controversy concerning the proper construction of Section 302 (a), since they interpreted only Section 302 (f) and the present ques-

3. As an alternative to his contention that the entire corpus of each trust should be included in decedent's gross estate under Section 302 (a), the Commissioner urged in the court below that all or some part of the 37½ percent of the trust property allotted to decedent's brother and sisters in the compromise should be included in gross estate under Section 302 (f) as property passing pursuant to an exercised power of appointment. The basis of the contention was that decedent, in his New York will, had sought to exercise his powers of appointment in favor of his brother and sisters and that the brother and sisters had received a share of the trust property in the compromise, in part at least by asserting their rights as appointees under that will. The decision below rejecting this argument is, we believe, in conflict with the decision of this Court in *Lyeth* v. *Hoey*, 305 U. S. 188.

In the *Lyeth* case, an heir of a decedent contested the validity of the decedent's will in which no provision had been made for him. A compromise was entered into under which the will was probated and a specified sum paid to the heir.

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tion was not there raised or considered. *Webster* v. *Fall*, 266 U. S. 507, 511; *Bingham* v. *United States*, 296 U. S. 211, 218; *United States* v. *Mitchell*, 271 U. S. 9, 14. Mere failure to raise the question in those cases is not sufficient evidence of an administrative practice to be of any substantial weight in settling the present controversy. Cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39.

This Court held that the heir had acquired the property "by inheritance" because he acquired it by virtue of his claim as heir. The theory of the decision was that a person who had no standing to make a claim except as heir, and who acquired property by asserting that claim, must be considered as acquiring the property for tax purposes in his capacity as heir. Similarly here, so much of what the brother and sisters obtained in the compromise by asserting their claim as appointees under decedent's will would seem, for tax purposes, to come to them as such appointees and therefore to have passed pursuant to an exercised power of appointment within the meaning of Section 302 (f).

The court below attempted to avoid the doctrine of *Lyeth* v. *Hoey* by determining (1) that the New York will was void; (2) that, since the will was void, nothing could have passed pursuant to the exercise of the powers of appointment in the will; and (3) that the compromise in fact repudiated rather than recognized the right to take by appointment. This approach, we believe, is a complete distortion of the *Lyeth* v. *Hoey* rule.

The brother and sisters asserted the validity of the will and their rights as appointees under the will in the North Carolina proceedings. Had they succeeded in their contention, they would have been entitled to the entire trust property; had their contention been rejected, and their alternative contention rejected as well, they would

have received nothing. They preferred, as did the other parties to the proceeding, to compromise their claim rather than litigate it in the North Carolina courts. Certainly, in this situation, it is not for the federal court considering the tax consequences of the compromise to determine, as did the court below, that one of the contentions compromised was without merit and therefore could not have contributed to the settlement. Under the doctrine of *Lyeth* v. *Hoey*, the brother and sisters, having claimed, in part at least, as appointees, and having acquired trust property by virtue of that claim, must be considered as taking as appointees even though the appointment now be deemed invalid.

The view expressed in the opinion below that, since the New York will was void, it could not have been a factor in the compromise, is not supported by the record.[10] Further, it is a conclusion

[10] If their claim as appointees was not a factor in the compromise, decedent's brother and sisters made an incredibly good bargain. Their alternative contention was extremely tenuous. It depended upon successful maintenance of each of the following points: that the judgment barring the Cannon child from participation in the trusts was valid; that the Reno divorce of Anne Cannon was invalid, although both parties and the Cannon child were represented at the divorce proceedings, and although both parties subsequently relied upon the decree by remarrying; that decedent's marriage to Libby Holman was bigamous and the Holman child therefore illegitimate; and that, being illegitimate, the Holman child could not be called decedent's "descendant," "issue," or "child" within the gift-over provisions of the trusts.

of fact upon which the Board did not pass and with respect to which, therefore, the court below should not have made a finding. If the court considered the question material, it should have remanded the case to the Board for a finding with respect to it. *Helvering* v. *Rankin*, 295 U. S. 123; *Helvering* v. *National Grocery Co.*, 304 U. S. 282.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

SEPTEMBER 1941.

APPENDIX

Treasury Regulations 80 (1934 Edition):

ART. 10. *Character of interests included.*—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

* * * * * *

ART. 11. *Specific property to be included.*—* * *

* * * * * *

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder in the case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of an interest or an estate limited for the life of the decedent. There should be included, however, the value of a reversionary interest retained by the decedent, which reverts upon the termination of a particular estate or in case of his prior death passes to others. There should also be included the value of an annuity payable to, or an interest or an estate vested in, the decedent for the life of another person who survives him. For

rules in valuing such remainders, annuities, and interests or estates *pur autrie vie*, see article 13, subdivision (10).

* * * * * *

ART. 24. *Property passing under general power of appointment.*—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) if the power is exercised by will. * * * It should be so included if the power is exercised by deed or other instrument * * * in contemplation of death. * * * It should also be so included if the power is exercised by deed or other instrument with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power. (For description of transfers included in the phrase, "intended to take effect in possession or enjoyment at or after * * * death," and the taxability thereof with reference to when made and when the death occurred, see articles 17, 18, and 19.) The statute, however, does not require inclusion in the gross estate of the value of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 1–31) are reported in 42 B. T. A. 145. The opinion of the Circuit Court of Appeals (R. 41–54) is reported in 121 F. (2d) 307.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 10, 1941 (R. 54–55). The petition for a writ of certiorari was filed on September 10, 1941, and granted on October 27, 1941.

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Decedent was the beneficiary of three trusts created by his parents. During the decedent's life, the income of each trust was either to be paid to him or to be accumulated. At his death, the property was to go to the person or persons to whom the decedent, in his sole discretion, might appoint by will. In default of appointment, the property of each trust was to go to his descendants or, if none, to his brother and sisters. Under the terms of one of the trusts, decedent was to receive the corpus outright upon attaining the age of 28. Decedent died at the age of 20 without having validly exercised his powers of appointment. Did the decedent at the time of his death have such an "interest" in the trust property as to require its inclusion in his gross estate under Section 302 (a) of the Revenue Act of 1926?

2. The decedent left a will by which he sought to appoint the trust property to his brother and sisters. The validity of the will was challenged and the will has never been probated. The decedent's brother and sisters, asserting a right to take as appointees under the will as well as a right to take under the gift-over provisions of the trusts if the will was invalid, obtained a substantial share of the trust property pursuant to a

judicially approved compromise. Is all or any part of the amount obtained by the brother and sisters in settlement to be considered as having passed under exercised powers of appointment and therefore includible in decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (f) [as amended by Section 803, Revenue Act of 1932, c. 209, 47 Stat. 169] To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or

enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth;

* * * * *

(U. S. C., Title 26, Sec. 811.)

The applicable Treasury Regulations will be found in the Appendix, *infra*, pp. 59–66.

STATEMENT

The facts, insofar as relevant to the two issues raised in the court below and presented by the petition for a writ of certiorari,[1] are not in dispute. They may be summarized as follows:

1. *Facts with respect to the first issue.*—The decedent, Zachary Smith Reynolds, was the beneficiary of three trusts, one created under the will of his father, R. J. Reynolds, probated in 1918, one created by deed of trust executed by his mother, Katharine S. Johnston (formerly Reynolds), in 1923, and one created by the will of his mother probated in 1924. Under the trust created by his father, decedent was to receive only a portion of the income until he reached the age of 28, the remainder of the income to be added to the corpus of the trust. Upon attaining the age of

[1] Certain contentions which the Government advanced before the Board of Tax Appeals, and which are discussed in the Board's opinion (R. 12 *et seq.*), were abandoned in the court below. In that court, the Government pressed only the two questions now before this Court for review (R. 42).

28, he was to receive the trust property outright, together with all accumulated income.[2] Under the trusts created by his mother, decedent was to enjoy the income of the property for life, with certain restrictions as to the payment of income to him before he attained the age of 28. Any income not paid to him or for his benefit before he reached 28 was to be added to the corpora of the trusts.[3] No one other than decedent had any right to or interest in any of the trust income during decedent's life. (R. 2–5.)

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[2] Under the terms of the will of decedent's father the income from decedent's trust, to the extent deemed necessary, was to be devoted to his support, maintenance, and education until he reached 21. Between the ages of 21 and 28, decedent was to receive between $5,000 and $50,000 per year, according to his mother's discretion, or $50,000 per year if his mother were not living. Also, between those ages, decedent was to receive, out of principal if necessary, two dollars for every dollar made or saved by him. Income not distributed was to be accumulated in the trust, for distribution to him (along with the corpus) when he attained the age of 28 (R. 59–60).

[3] The will of decedent's mother provided that until decedent reached the age of 21, the income from his trust was to be devoted to his support and education, according to the discretion of his guardians. Between the ages of 21 and 28 the income was to be paid to him or for his benefit according to the discretion of the trustees. Under the deed of trust executed by his mother, none of the income was to be distributed to the decedent until he reached the age of 28. Both the mother's will and deed of trust directed that the trust income should be paid to decedent during his life after he reached 28, and that income accruing before that time and not distributed to him should be added to the corpus (R. 68–69, 73–74).

In the case of all three trusts, decedent was given a general power of appointment over the trust property, exercisable by will in favor of any person or persons he might in his sole discretion select. In default of the exercise of the power of appointment, the trust property was to go to decedent's descendants, if any, or if he had no descendants to his brother and sisters and their issue *per stirpes*. (R. 3–5.)[4]

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[4] Under the will of decedent's father the complete limitation in case of decedent's death under twenty-eight reads as follows (R. 60–61);

"(7) Should any of my children die before he or she shall arrive at the age of twenty-eight (28) years, then the share of my estate which would have been payable to him or her, had he or she arrived at that age, shall be continued to be held by my said Trustee for the use and benefit of his or her devisees by Will until the time that such child would have arrived at the age of twenty-eight years, if he or she had lived, when the said trust shall cease and the estate shall then become payable to such devisees, the Trustee, however, paying in the meanwhile the income from said share to them; but should any of my children die before that time without having disposed of his or her share by Will but leaving issue by him or her surviving, the share of said deceased child shall continue to be held by my said Trustee for the use and benefit of his or her children living at his or her death, paying unto them or applying so much of the net income of the share of my child so dieing as said Trustee may deem necessary for their support and maintenance and accumulating the balance until the time my child so dieing would have arrived at the age of twenty-eight years, if he or she had lived, when the trust shall cease and the estate shall then become vested in his or her children, then surviving; and, should any of my said children die without having made a testamentary disposition of his or her share of my said estate and without issue living at the termination of said

Decedent died on July 6, 1932, about four months before he would have attained the age of 21. He was then domiciled in North Carolina and, under the laws of that state, was incapable of disposing of property by will because of his minority. (R. 5, 21.)

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trust, then his or her share shall be held on like trusts for my surviving children and the then living issue of my deceased children per stirpes; and should all of my children and their issue die before the termination of the trusts, then, in that event, one-half of the trust estate in value at that time, principal and income shall go to and belong to my said wife, and the other half to my brothers and sisters then living and the descendants then living of any of my deceased brothers and sisters, per stirpes."

The basic trust limitation in the mother's trust deed reads as follows (R. 73–74):

"The Safe Deposit & Trust Company of Baltimore as Trustee hereunder shall hold the share of each child for such child during its life, and upon its death shall distribute, transfer, and deliver the same to and among, or hold the same for such person or persons, objects or purposes, in trust and otherwise, as such child shall by its Last Will nominate and appoint to take the same, and in default of such appointment shall distribute, transfer and deliver the same to the descendants of such child living at its death, per stirpes and not per capita, and in default of such appointment and in default of descendants of such child the said Trustee shall at its death divide and distribute the same among such of said children and their descendants as are then living, per stirpes and not per capita, but the shares of such of her said children as are then living shall be held by said Trustee in trust for them and upon the same trusts that their original shares are then held."

The limitation in the mother's will is the same, except that in event of decedent's death without descendants, his stepfather is to share with his brother and sisters (R. 68–69).

2. *Additional facts with respect to the second issue.*—Decedent was twice married, first to Anne Cannon and thereafter to Libby Holman. He left surviving him a child by the first marriage, Anne Cannon Reynolds II (hereinafter sometimes called the Cannon child), and a posthumous child by the second marriage, Christopher Smith Reynolds (hereinafter sometimes called the Holman child). (R. 6–9.)

After decedent had been separated from his first wife, he entered into a settlement with her, by which two trust funds of $500,000 each were set up for her and the child. The judgment embodying this settlement barred the wife and child from making any further claims for financial support against the decedent and from any participation in decedent's trusts. Subsequently, on November 23, 1931, Anne Cannon Reynolds obtained a divorce at Reno, Nevada. Six days later decedent married Libby Holman. (R. 7–8.)

A few months before his divorce, decedent, while temporarily staying in New York, executed a purported will with three witnesses, in which he attempted to exercise his powers of appointment in favor of his brother and sisters. In this will, decedent declared that he had adopted and acquired a domicile in New York and that he intended to make it his permanent home. (R. 7.)

After decedent's death, claims were asserted to the trust property by the Cannon child, by the Holman child, and by the decedent's brother and sisters. The validity of the decedent's divorce from Anne Cannon, the validity of the judgment barring Anne Cannon and her child from participation in the trust property, and the validity of the New York will were all contested issues (R. 9–11). Decedent's brother and sisters urged that they were entitled to the trust property because the New York will was valid and in that will decedent had exercised his powers of appointment in their favor (R. 9–10, 114–117). They further urged that, even if the New York will was invalid, they were entitled to the trust property under the gift-over provisions of the trusts. This last contention was based on the theory that the Cannon child was excluded from taking because of the judgment mentioned above and that the Holman child was excluded from taking because decedent's divorce from Anne Cannon was invalid and the Holman child therefore illegitimate (R. 9).

Extensive litigation ensued in the North Carolina state courts to determine the validity of the various claims to the trust property. See *In Re Reynolds*, 206 N. C. 276; *Reynolds* v. *Reynolds*, 208 N. C. 578 (R. 76–130). A compromise was finally reached under which, after the payment of $2,000,000 to the State of North Carolina to settle

its claim for inheritance taxes, 37½ percent of the remainder was allotted to the Cannon child, 25 percent was allotted to the Holman child, and 37½ percent was allotted to decedent's brother and sisters. Seven hundred fifty thousand dollars was paid to the brother and sisters to be turned over to Libby Holman. The North Carolina Superior Court confirmed the compromise and its judgment was affirmed by the North Carolina Supreme Court. (R. 10–11.)

The Safe Deposit & Trust Company of Baltimore, trustee of each of the trusts, had instituted equity proceedings in the Circuit Court of Baltimore City, seeking protection with respect to any distribution of the trust property. After all interested parties, including the executor named in the New York will, had been brought in, that court entered a decree affirming the compromise which the North Carolina court had approved and directing that it be carried out. The executor named in the New York will was subsequently discharged from any duty to probate the will in New York or defend it in the Maryland proceedings. (R. 11–12.)

3. *Action of the Commissioner.*—The estate tax return filed on behalf of decedent's estate did not include any part of the trust property in the gross estate. The Commissioner determined that the entire value of the trust property should be included and accordingly assessed a deficiency in estate tax of $8,520,820.55, less any credit for inheritance

taxes paid to the State of North Carolina (R. 2, 12).[5] The Board of Tax Appeals held this action of the Commissioner to be erroneous (R. 31–32). The Commissioner appealed, limiting his appeal to the two questions now before this Court. The court below rejected the Government's contentions on both issues and affirmed the decision of the Board (R. 42–55).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that decedent did not have an interest in the corpus of each of the trusts created for him by his parents which was taxable as part of his gross estate under Section 302 (a) of the Revenue Act of 1926.

2. In holding that no part of the corpora of the trusts should be included in gross estate under Section 302 (f) of the Revenue Act of 1926, as amended, as having in effect passed under powers of appointment exercised by decedent.

3. In affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

The decedent had an "interest" in the trust property within the meaning of Section 302 (a)

[5] Since $2,000,000 was paid to the State of North Carolina for inheritance taxes, the principal amount of the deficiency is approximately $6,520,000; when interest is added, the amount involved in this case becomes nearly $10,000,000.

of the Revenue Act of 1926, and the value of that property was therefore properly included by the Commissioner in decedent's gross estate.

A. This Court has frequently ruled that one who has all the substantial attributes of ownership of property, although no title thereto, is to be treated as the owner of the property for tax purposes. This rule is based on the unassailable assumption that Congress, in enacting the revenue laws, intends tax consequences to depend upon the substance of things and not upon the "niceties of the law of trusts and conveyances." *Helvering* v. *Clifford*, 309 U. S. 331, 334. That rule is fully applicable to Section 302 (a), for this Court has consistently recognized that the criterion for imposition of the estate tax is the transfer of the economic benefits of property at the decedent's death and not the mere passage of a technical legal or equitable title. See, *e. g.*, *Klein* v. *United States*, 283 U. S. 231, 234; *Helvering* v. *Hallock*, 309 U. S. 106, 111; cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 43.

The court below disregarded these controlling principles. It held that Congress, in enacting Section 302 (a), intended to tax only the devolution of property owned by the decedent and which passed at his death by will or intestacy, and that since, under state law, decedent had no legal or equitable title to the trust property and it therefore did not pass as part of his estate, it was not

taxable to his estate under Section 302 (a). The court refused to consider whether the decedent's "bundle of rights" in the trust property (see *Helvering* v. *Clifford, supra,* at 337) gave him the same rights of enjoyment and disposition as an owner; in the view of the court, it was decisive that, under state law, no single one of decedent's rights, considered separately, conferred upon decedent any technical legal or equitable title.

This construction of the statute accords neither with the literal language nor the legislative history of Section 302 (a). Had Congress intended to tax only the transfer of title to property which passes as part of the decedent's estate, it would scarcely have used the word "interest" as the sole statutory test—a word completely inapt if intended to connote only legal or equitable titles. From 1916 until 1926, the statute was in fact confined to property interests of the decedent which were "subject to distribution as part of his estate"; in the Revenue Act of 1926, however, Congress deleted this provision. To construe the statute as did the court below, therefore, is to read into it a limitation for which Congress not only failed to provide but which it saw fit specifically to eliminate. Furthermore, the construction of the statute adopted by the court below leaves unanswered the critical question of why Congress would have wanted to draw a distinction for tax purposes between an owner of property and a per-

son having substantially the same rights of enjoyment and disposition as an owner, although not his legal title.

E. At the time of his death, decedent did possess substantially all the attributes of ownership of the trust property:

(1) He had an exclusive lifetime enjoyment of the property, subject only to a restraint on alienation and restrictions on the use of income until he reached the age of 28.

(2) He had, in addition, an unrestricted power of testamentary disposition, including the power to appoint the property to his own estate or to his creditors. Such a power to bestow his property upon any person he chooses is the only attribute of ownership available even to an absolute fee owner "at the time of his death"—the determinative time under the statute. This court has frequently stated that "for purposes of taxation, a general power of appointment * * * [is] equivalent to ownership of the property subject to the power" (*Curry* v. *McCanless*, 307 U. S. 357, 371, and cases cited; *Graves* v. *Elliott*, 307 U. S. 383, 386), and has specifically pointed out that "the nonexercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death." *Chase National Bank* v. *United States*, 278 U. S. 327, 338.

(3) Finally, decedent had the assurance that if he failed effectively to exercise his testamentary powers of appointment, the property would go to

members of his immediate family who were the natural objects of his testamentary bounty, namely, his children, or, if none, his brother and sisters. Such a gift-over provision is comparable to the provision of law for the distribution of property in the event of the death of an absolute fee owner intestate.

Because of this "bundle of rights" possessed by the decedent, we think it plain that the attributes of ownership which he had at the time of his death were substantially the same as though he had been given a fee title to the trust property, subject to a restriction on alienation and limitations as to the use of the income, and that, therefore, under the rationale of the *Clifford* case, decedent was properly treated as the owner of the property for purposes of Section 302 (a).

C. There is nothing in the structure or legislative history of the estate-tax law, or in the decisions construing it, which prevents application of the *Clifford* rule to the present case.

(1) The legislative history of Section 302 refutes the view, expressed by the court below, that the specific provision of Section 302 (f) for the taxation of property passing pursuant to the exercise of a power of appointment indicates that Congress did not intend to tax property subject to an unexercised power. To sustain the view of the court below in this respect, respondents must contend that Congress did not intend the combination of rights possessed by this decedent to

constitute an "interest" within Section 302 (a) because when it amended Section 302 (a) so as to broaden its scope and to make it susceptible of literal application to such a combination of rights, it failed at the same time to trike out the previously enacted provision of Section 302 (f) which covered part of the same field. Such a contention does not accord with the realities of the law-making process.

(2) *United States* v. *Field*, 255 U. S. 257, the principal authority relied upon by the court below, is distinguishable, for the statutory provision there under consideration was far narrower in scope than Section 302 (a) as it appears at present. *Helvering* v. *Grinnell*, 294 U. S. 153, and *Morgan* v. *Commissioner*, 309 U. S. 78, likewise relied upon by the court below, involved the interpretation of Section 302 (f); no contention was made in either of those cases with respect to the proper construction of Section 302 (a).

II

If Section 302 (a) is inapplicable here, nevertheless some part of the trust property should be included in decedent's gross estate as having passed under an exercised general power of appointment within the meaning of Section 302 (f). The record clearly reveals that decedent's brother and sisters obtained 37½% of the trust property in a compromise, in part, at least, by asserting that the powers of appointment were validly ex-

ercised in their favor. Under the doctrine of *Lyeth* v. *Hoey*, 305 U. S. 188, that part of the trust property so obtained must be deemed to have passed to them under exercised general powers. The case should be remanded to the Board of Tax Appeals for a determination of the value of that part.

ARGUMENT

I

THE VALUE OF DECEDENT'S INTEREST IN THE TRUST PROPERTY IS INCLUDIBLE IN HIS GROSS ESTATE UNDER SECTION 302 (a) OF THE REVENUE ACT OF 1926

1. THE ISSUE BEFORE THE COURT

Section 302 (a) of the Revenue Act of 1926, as amended, provides for the inclusion in the gross estate of the decedent of the value at the time of the decedent's death of all property—

> (a) To the extent of the interest therein of the decedent at the time of his death; * * *

The question in this case is whether the rights which the decedent possessed in and to the trust property constituted an "interest" in that property "at the time of his death" within the meaning of this provision.

The nature of decedent's rights is not in dispute, nor can there be any real question that they gave him substantially all of the attributes of ownership of the trust property. We analyze these rights in detail below, but they may be summarized

briefly as follows: All the income from the trust property was either to be paid to the decedent currently or accumulated; upon attaining the age of 28 decedent would receive the corpus of one trust outright and beginning then and continuing for the rest of his life he would receive the entire income of the other two. At the moment of his death he possessed a general power to dispose of the trust property and all accumulated income to whomsoever he chose, including his own estate or creditors. If he failed to exercise the power, the property would pass to his next of kin—his children for whom it was his moral obligation to provide, or, if none, his brother and sisters.

It is apparent, therefore, that decedent, to the exclusion of all other persons, could enjoy the fruits of the trust properties and dispose of their substance at his death. The only real difference between his position and that of an absolute fee owner was that his ownership was subject to spendthrift provisions—restraints on alienation during his first 28 years (or, as to two trusts, during his life), and partial limitations on enjoyment of the income during his first 28 years. But at the moment of his death decedent's situation could not be distinguished from that of a legal fee owner, for his unlimited power of disposition at that moment gave him all the rights which a holder of an absolute fee title would have had.

The court below considered the foregoing facts immaterial. It held that Congress, in enacting

Section 302 (a) of the Revenue Act of 1926, intended to tax only the devolution of property owned by the decedent and which passed at his death by will or intestacy, and that since, under state law, decedent had no legal or equitable title to the trust property and it therefore did not pass as part of his estate, it was not taxable to his estate under Section 302 (a). The court refused to consider whether the decedent's "bundle of rights" in the trust property (see *Helvering* v. *Clifford*, 309 U. S. 331, 337) gave him the same rights of enjoyment and disposition as an owner; in the view of the court, it was decisive that, under state law, no single one of the decedent's rights, considered separately, conferred upon decedent any technical legal or equitable title which passed upon his death by will or intestacy.

The issue is thus sharply posed. Does the word "interest" as used in Section 302 (a) refer only to property of which the decedent is technically the owner, as the court below held, or does it also comprehend, as we contend, interests in property which give a decedent all the substantial attributes of ownership of that property but not technical title thereto?

The issue is an important one. Trust provisions of the type involved in this case, combining a life estate,* a testamentary power of dis-

* One of the trusts was to terminate when the decedent reached the age of 28, at which time he was to be given the corpus outright.

position in the life beneficiary, and a gift-over provision in favor of the life beneficiary's children and next of kin in the event of non-exercise of the power of appointment, are in constant use. They are specifically designed to confer upon the life beneficiary all the substantial attributes of ownership of the trust property, except the power of alienation during his lifetime, while still withholding from him technical title to the property. To hold, as did the court below, that this device successfully avoids the impact of the estate tax law is, therefore, to sanction a method by which ownership benefits can be enjoyed by a decedent during his life without the imposition of corresponding estate tax obligations upon his death. We do not believe that Congress intended any such easy method of avoidance of the normal tax consequences of the transfer of the economic benefits of property upon a decedent's death, or that this result is either required or justified by the language of the statute.

2. ONE WHO HAS ALL THE SUBSTANTIAL ATTRIBUTES OF OWNERSHIP OF PROPERTY MUST BE TREATED AS ITS OWNER FOR TAX PURPOSES

The decision of this Court in *Helvering v. Clifford*, 309 U. S. 331, is persuasive authority in favor of the Government's position. There the Court held that the grantor of a short-term trust, of which the grantor's wife was the beneficiary, was taxable on the trust income because of the

many attributes of ownership which he had retained. The teaching of the case, as of many other recent decisions of this Court, is that one who is substantially the owner of property is to be treated as its owner for tax purposes, even though legal title may be vested in another. See also *Helvering* v. *Horst*, 311 U. S. 112; *Harrison* v. *Schaffner*, 312 U. S. 579; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42–43; *Burnet* v. *Guggenheim*, 288 U. S. 280, 283.

This fundamental rule for the construction of tax statutes is based on the assumption, which we believe to be unassailable, that Congress, in enacting the revenue laws, intends tax consequences to depend upon the substance of things and not upon the "niceties of the law of trusts or conveyances." *Helvering* v. *Clifford*, *supra*, at 334. This rule is fully applicable to the estate tax law.[7] It cannot with realism be supposed that Congress, when it enacted the estate tax, was concerned with technical considerations of real property law. Rather, it was seeking to impose tax consequences

[7] See *Helvering* v. *Hallock*, 309 U. S. 106; *Chase National Bank* v. *United States*, 278 U. S. 327, 335; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345; *Tyler* v. *United States*, 281 U. S. 497, 503; *Klein* v. *United States*, 283 U. S. 231; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160; *Gwinn* v. *Commissioner*, 287 U. S. 224, 229; *Porter* v. *Commissioner*, 288 U. S. 436; *Third National Bank & Trust Co.* v. *White*, 287 U. S. 577; *Helvering* v. *Bowers*, 303 U. S. 618; *Foster* v. *Commissioner*, 303 U. S. 618; *United States* v. *Jacobs*, 306 U. S. 363, 371; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271.

upon all transfers of property interests, however characterized under state or common law, whereby the economic benefits of the property shifted from the decedent to another by reason of the decedent's death. As this Court stated in *Estate of Sanford* v. *Commissioner, supra,* at 43, with respect to the gift tax, "Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title." See also *Chase National Bank* v. *United States,* 278 U. S. 327, 338; *Graves* v. *Elliott,* 307 U. S. 383; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271; *Helvering* v. *Hutchings,* 312 U. S. 393, 396; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Burnet* v. *Guggenheim,* 288 U. S. 280, 287; *Tyler* v. *United States,* 281 U. S. 497, 503–504; *United States* v. *Jacobs,* 306 U. S. 363.

It is our position, then, that the controlling tax event for purposes of the estate tax is the transfer to another, by reason of the decedent's death, of the possession and enjoyment of property of which decedent, at the time of his death, had the benefits of ownership. See *Klein* v. *United States,* 283 U. S. 231, 234; *Helvering* v. *Hallock,* 309 U. S. 106, 111. It is, we suggest, unreasonable to think that where such a transfer of beneficial ownership occurs, Congress intended taxability to depend upon whether there was also a technical transfer of title. As this Court observed in *Corliss* v. *Bowers,* 281 U. S. 376, 378, "taxation is not so much con-

cerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

The contrary view of the court below that the existence of a taxable transfer depends upon whether the decedent had such title in the property under state law that upon his death the property passes as part of his estate, accords neither with the literal language nor the legislative history of Section 302 (a). Had Congress intended to tax only the transfer of title to property which passes as part of the decedent's estate, it would scarcely have used the word "interest" as the sole statutory test—a word completely inapt if intended to connote only legal or equitable titles. From 1916 until 1926, the statute was in fact confined to property interests of the decedent which were "subject to distribution as part of his estate";[8] in the Revenue Act of 1926, however, Congress deleted this provision. To construe the statute as did the court below, therefore, is to read into it a limitation for which Congress not only

[8] During these years, the predecessor sections to Section 302 (a) of the Revenue Act of 1926 were specifically limited to an interest of the decedent at the time of his death, "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." See Revenue Act of 1916, c. 463, 39 Stat. 756, Section 202 (a); Revenue Act of 1918, c. 18, 40 Stat. 1057, Section 402 (a); Revenue Act of 1921, c. 136, 41 Stat. 227, Section 402 (a); Revenue Act of 1924, c. 234, 43 Stat. 253, Section 302 (a).

failed to provide but which it saw fit specifically to eliminate.

Furthermore, the construction of the statute adopted by the court below leaves unanswered the critical question of why Congress would have wanted to draw a distinction for tax purposes between an owner of property and a person having substantially the same rights of enjoyment and disposition as an owner, although not his legal title. Certainly the difference in the manner by which the benefits of ownership are transferred in the case of a decedent who is a fee owner and in the case of a decedent who has substantial ownership but no title furnishes no reason for a differentiation in tax treatment. In both cases, the rights of the decedent terminate upon his death. In both cases, too, the property "passes" to another only in the sense that the expiration of the decedent's rights at his death perfects the rights of his successors in interest. Since the two types of "transfer" of ownership benefits are the same in substance,[9] there is no reason to believe that

[9] The only difference in the two types of situations is that in the case of a fee owner, the successor is determined by the provisions of the decedent's will or by the state laws of intestacy, while in the case of the decedent in this case, the successor is determined by the provisions of his will, or, in default of testamentary appointment, by the terms of the instrument creating the trust. But this difference is plainly immaterial for tax purposes; the crucial fact is not the manner in which the decedent's successor in interest is selected, but the termination of ownership rights in the decedent and the perfection of such rights in his successor.

Congress intended to distinguish between them for tax purposes.

We earnestly submit, therefore, that since as we show below, the decedent in this case did have substantially the same rights of enjoyment and disposition of the trust property as an owner, he was properly treated for purposes of the estate tax as owner altogether.

3. AT THE TIME OF HIS DEATH, DECEDENT POSSESSED SUBSTANTIALLY ALL THE ATTRIBUTES OF OWNERSHIP OF THE TRUST PROPERTY

In determining whether decedent's interest in the trust property amounted in substance to ownership of that property, the whole "bundle of rights" which he possessed must be considered together. This Court specifically so held in the *Clifford* case, where it pointed out that "no one fact is normally decisive" and that "all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership * * *." 309 U. S. at 336. In view of the *Clifford* case, it seems clear that the court below erred in basing its decision upon the conclusion (R. 50) that, under state law,[10] no single

[10] The court below quoted from *Morgan* v. *Commissioner*, 309 U. S. 78, 80, as follows:

"State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

The court mistakenly concluded (R. 50) that this proposition somehow supported its construction of the statute. The *Morgan* case makes it clear that the test of the meaning of

one of decedent's rights, separately considered, amounted to an "interest" in the property. None of decedent's rights existed in the theoretical isolation in which the court below examined them; they existed as a whole, and it is therefore as a whole that they must be viewed in deciding whether or not the decedent occupied the position of beneficial owner.

The holder of an absolute equitable or fee title to property has "at the time of his death" the following attributes of ownership: (A) a lifetime enjoyment of the property, to the exclusion of all others; (B) an unlimited power to dispose of the property by will to whomsoever he chooses, including his own estate or creditors; and (C) the assurance that if he fails to dispose of the property by will, it will pass by the laws of intestacy to the members of his immediate family. We believe it plain that decedent's rights in and to the trust corpora gave him, in all substantial respects, the same attributes of ownership.

A. At the time of decedent's death, there was drawing to its close a lifetime enjoyment of the trust property which rested with decedent to the

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the word "interest" in the federal tax statute is not the meaning attributed to the word under local law. Rather, that case shows that the proper inquiry is whether the word "interest," as construed independently of local law, comprehends an aggregate of rights in property such as the local law gave to decedent at the moment of his death. See also *Lyeth* v. *Hoey*, 305 U. S. 188; *Burnet* v. *Harmel*, 287 U. S. 103.

exclusion of all others. Until he reached the age of 28 he was entitled to a substantial portion of the income from the trusts and such part as was not distributed to him was accumulated. After he reached 28 he would have been entitled to receive all income accruing from the trusts created by his mother, and any income accumulated prior to his twenty-eighth year, together with the corpus, would be a source of income to be distributed to him after that time. With respect to the largest of the three trusts, that created by his father, decedent was entitled to receive the accumulated income together with the corpus outright when he reached the age of 28. In that trust, therefore, decedent had more than a life estate; he had in effect ownership of the property, possession merely being postponed until he attained the requisite age."

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[11] The deficiency notice of June 11, 1938, which was sent to Safe Deposit and Trust Company of Baltimore, Trustee, and to the administrator of the estate of Smith Reynolds, includes in decedent's gross estate the assets in decedent's three trusts, as follows: In the trust created by the will of decedent's father, assets totalling $17,378,457.55; in the trust created by the will of decedent's mother, assets totalling $3,559,711.91; in the trust created by the deed of decedent's mother, assets totalling $107,030.27. The notice also includes assets separated from the trust created by the father's will and held in two trusts, one for the benefit of decedent's wife Anne Cannon (assets aggregating $459,770.80) and one for the benefit of the Cannon child (assets aggregating $460,438.36).

The trust for Anne Cannon was continued by the compromise and judgment entered thereon (R. 96). If the Com-

It may be urged that decedent's lifetime enjoyment was not complete because up to the time of his death part of the income was being withheld from him and he was not free to alienate the corpus. The important fact, however, is that decedent's enjoyment was at all times exclusive. No other person received the income not distributed to him, and no other person could alienate the assets of the trust, or invest its funds, except the trustees who acted for decedent in preserving and accumulating an estate which would be subject to his unfettered control at the moment of his death.

Property held by formal fee title does not escape the force of Section 302 (a) simply because of lifetime restrictions upon alienation or enjoyment. See *Landman* v. *Commissioner*, 123 F. (2d) 787 (C. C. A. 10), pending on petition for certiorari, No. 904, present Term. There an allotment of oil land held by the United States for a re-

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missioner is successful in his argument under this Point I, the case should be remanded to the Board of Tax Appeals with directions to eliminate from the gross estate the assets contained in this trust. Decedent at the time of his death did not possess rights equivalent to ownership in this trust property.

On the other hand, the trust created for the Cannon child was cancelled by the compromise judgment. Principal and accumulated income were returned to the trust created for decedent by his father's will (R. 96). The assets of this trust were therefore properly treated as part of the property in which decedent had rights amounting to ownership at the time of his death.

stricted Creek Indian, and all accumulated income therefrom, was held to be subject to the estate tax at her death, despite the fact that she could not alienate the property and received only such income as the federal officer superintending her affairs thought necessary for her maintenance and that of her family. The restrictions upon lifetime enjoyment imposed by the trust instruments in the present case are plainly no greater than those involved in the *Landman* case.

B. In addition to the ownership attribute of exclusive lifetime enjoyment of the property, decedent had an unrestricted power of testamentary disposition. The Court should note that such a power to bestow his property upon any person he chooses is the only attribute of ownership available even to an absolute fee owner "at the time of his death"—the determinative time under the statute. The decedent's power over the trust property was plainly the same in this respect as that of an absolute owner. The satisfaction of paying debts incurred for his own benefit during his lifetime was also available to the decedent, for he had the power to make the property his own by appointing it to his creditors. Cf. *Douglas* v. *Willcuts*, 296 U. S. 1; *Burnet* v. *Wells*, 289 U. S. 670.[12]

[12] The possessor of a general power of appointment exercisable by will only may, during his lifetime, go far toward enjoying the economic fruits of the ownership of the prop-

Emphasis has sometimes been placed upon what is said to be the common law theory of the nature of a power of appointment. This theory is that the possessor of a general power has no estate in the property; if the power is exercised, the appointees derive their title to the property from the donor of the power and nothing passes to them from the donee. Whether or not this is a correct statement of the common law theory,[13] it obviously ignores the realities of the situation. The donee of a general power of appointment has effective

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erty. Though a contract to exercise the power by will may not be enforceable in equity (*Farmers' Loan and Trust Co.* v. *Mortimer*, 219 N. Y. 290; Note, 30 Harv. L. Rev. 401; 3 Restatement of the Law of Property, Section 340), nevertheless the obligee may, if such a contract is not observed, recover damages or get restitution from the estate of the possessor of the power. *Matter of Rogers*, 168 Misc. (N. Y.) 633, 639; 3 Restatement of the Law of Property, Section 340 and comment. There is little difference between a right to damages and a right to restitution since a creditor entitled to restitution may get a money judgment against the estate for the sum advanced (Restatement of the Law of Restitution, Section 4 (f) and Comment (e)) and presumably has collected interest periodically prior to the decedent's death. Thus a creditor can place considerable reliance upon a contract to exercise by will a power of appointment in his favor. Furthermore, a general testamentary power may be released by the donee for a consideration. *Lyon* v. *Alexander*, 304 Pa. 288; see cases cited in 76 A. L. R. 1430; 3 Restatement of the Law of Property, Section 334; Note, 51 Harv. L. Rev. 1451. Thus the donee of the power and taker in default together may sell a fee interest, or the former may sell to the latter.

[13] See Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 932, n. 17.

control and dominion over the subject property. That is the significant fact which for tax purposes should be determinative.

This Court has frequently stated that "for purposes of taxation, a general power of appointment * * * [is] equivalent to ownership of the property subject to the power" (*Curry* v. *McCanless*, 307 U. S. 357, 371, and cases cited; *Graves* v. *Elliott*, 307 U. S. 383, 386), and that "to make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." *Chase National Bank* v. *United States*, 278 U. S. 327, 338; *Bullen* v. *Wisconsin*, 240 U. S. 625, 630. Further, the Court has specifically pointed out that "the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death." *Chase National Bank* v. *United States*, *supra*, at 338.[14]

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[14] While the possessor of a general power exercisable either *inter vivos* or by will has greater rights during his life than the possessor of a general power exercisable only by will, he has no advantage "at the time of his death." In this connection the decision of this Court in *Curry* v. *McCanless*, 307 U. S. 357, is significant. The jurisdiction of a state to tax trust property not within its borders was there in question. The tax sought to be imposed was an estate tax and the alleged taxable event was the death of the grantor of the trust, who was a domiciliary of the state. The only basis for jurisdiction was the grantor's interest in the trust property resulting from her retention of a life estate and a general testamentary power of appointment. In sustaining the tax, this Court said (pp. 370–371): "The decedent's power

Even at common law, a life estate plus a general testamentary power was considered almost the equivalent of fee ownership. See Sugden on *Powers* (1856 ed.), Vol. 1, p. 180, *et seq.* And statutes in several states provide that a life tenant with a general power can in fact convey a fee. See Glenn, *Fraudulent Conveyances and Preferences* (Rev. ed. 1940), Vol. 1, Section 159; New York Real Property Law, Sections 149 and 152. But whether a life tenant with a general power of testamentary disposition can convey a fee or not, at the very least he enjoys the rights of ownership, subject only to a restraint on alienation similar to a spendthrift provision.[15]

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to dispose of the intangibles was a potential source of wealth which was property in her hands * * *.

"For purposes of taxation, a general power of appointment, of which the testatrix here was both donor and donee, has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power. *Chanler* v. *Kelsey*, 205 U. S. 466; *Bullen* v. *Wisconsin*, *supra*, 630 [240 U. S. 625, 630]; *Chase National Bank* v. *United States*, 278 U. S. 327, 338; see Gray, *Rule Against Perpetuities* (3d ed. 1916), Sec. 524."

See also *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271; *Commissioner* v. *Prouty*, 115 F. (2d) 331, 335-336 (C. C. A. 1st).

[15] The decedent's status as owner of the property is not altered by the fact that the power was given to him by another. His interest at the time of death was the same as that of an owner who reserves a power when conveying the property. *Commissioner* v. *Prouty*, 115 F. (2d) 331 (C. C. A. 1st); *Richardson* v. *Commissioner*, 121 F. (2d) 1 (C. C. A. 2d), certiorari denied, November 10, 1941 No. 692, present Term; *Brown* v. *Commissioner*, 119 F. (2d) 983 (C. C. A. 7th); cf. *Commissioner* v. *Solomon*, decided by the Circuit

On this point, the decision of this Court in *Chase National Bank* v. *United States, supra,* seems decisive. There the Court stated (278 U. S. at 338):

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey,* 205 U. S. 466. * * * And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin,* 240 U. S. 625; cf. *United States* v. *Robbins,* 269 U. S. 315, 327; *Cohen* v. *Samuels, supra.*

See also *Curry* v. *McCanless, supra,* p. 372; *Graves* v. *Elliott,* 307 U. S. 383; *Bullen* v. *Wisconsin, supra; Saltonstall* v. *Saltonstall, supra; Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Corliss* v. *Bowers,* 281 U. S. 376, 378.[16]

Court of Appeals for the Third Circuit on November 28, 1941, not yet officially reported but found in 1941 C. C. H., Federal Estate and Gift Tax Service, par. 10,111.

[16] Cf. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39; *Rasquin* v. *Humphreys,* 308 U. S. 54; *Heivering* v. *Hutchings,* 312 U. S. 393, 396; *Burnet* v. *Guggenheim,* 288 U. S. 280; *Tyler* v. *United States,* 281 U. S. 497; *United States* v. *Jacobs,* 306 U. S. 363.

These authorities demonstrate, we believe, that the general power of appointment possessed by the decedent at the time of his death was, in every realistic sense, a most important attribute of ownership in the trust property. They also dispose of any suggestion that decedent's rights in that respect did not pass from him to others at his death.[17]

[17] Taxpayer died domiciled in the State of North Carolina at the age of twenty years and eight months. By the law of that state, he was prevented from passing property by will because he was under twenty-one. North Carolina Code (1931), Section 4128; cf. Section 4132. But this disability, assuming that it prevented exercise of his testamentary powers over the property, was no different from the disability under which he would have been had he held formal fee title to the property at the time of his death.

The disability did not inhere in the powers, but was imposed by the law of the state of his final domicile. An appropriate change in the statutes of North Carolina prior to decedent's death, but after the creation of the powers, would have enabled him to exercise the powers at an earlier age. Similarly, decedent might have succeeded in changing his domicile to another state where arrival at the age of 21 was not a prerequisite to the making of a valid will. If he had done so, the powers could have been exercised at the time of his death. Restatement of the Law of Conflict of Laws, Section 287; 2 Beale, *Conflict of Laws* (1935 ed.), Section 287.1, pp. 1010–1011. In more than half of the states a married male of 18 or more can make a valid will of personalty. In some states ages ranging down to 14 are sufficient. 1 Schouler, *Wills, Executors and Administrators* (6th ed.), Sec. 77.

In view of the fact that decedent could, by changing his domicile, have exercised his powers of appointment, it is clear that the disability imposed upon him by the North Carolina statute was less of a bar to his enjoyment of the rights of property ownership than it would have been had he

C. In addition to his rights of lifetime enjoyment and his power of absolute disposition upon his death, decedent had the assurance that if he failed effectively to exercise his testamentary powers of appointment the property would go to members of his immediate family who were the natural objects of his testamentary bounty, namely, his children, or, if none, his brother and sisters. Such a gift-over provision is comparable to the provision of law for the distribution of property in the event of the death of an absolute fee owner intestate. The slight discrepancy between the limitations over in the trust instruments and the intestacy statute of North Carolina [18] is, we believe,

owned fee title to real estate in North Carolina. Had he owned such fee title he could under no circumstances have disposed of the property by will until he reached 21.

[18] Under Sections 137 and 1654 of the North Carolina Code (1931), intestate personal property is distributable first to the children and then to the next of kin of equal degree and those who legally represent them, a child being treated as the legal representative of his deceased parents. However, if there is a widow, she receives half of the estate or a child's share if there are more than two children. A parent is next of kin in the nearest degree after children. Under the wills and deed of decedent's parents, his children were the primary inheritors in default of appointment. Secondary takers, who would receive if there were no living children or descendants, were decedent's brother and sisters and the living issue *per stirpes* of any deceased brother or sister. Thus the provisions of the wills and deed of decedent's parents followed the intestacy laws of North Carolina except in failing to provide for a widow of decedent.

There are two further minor exceptions. The will of decedent's father provides for decedent's mother in the event

of no greater significance for purposes of the federal estate tax than the discrepancies between the intestacy provisions of the laws of the various states.[19] The important fact is that decedent was in substantially the same position as a fee owner in that members of his immediate family were destined to inherit the trust property in the event that he did not dispose of it by will. Cf. *Helvering* v. *Clifford*, *supra*.

The foregoing analysis demonstrates, we think, that the attributes of ownership possessed by decedent at the time of his death were substantially the same as though he had been given a fee title to the trust property, subject to restriction on

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that decedent should die without leaving living children or living brothers or sisters or the issue thereof. Under the intestacy laws decedent's mother would take before his brother or sisters if she were living at his death, which she was not. Since decedent's father died before the will and deed of his mother became effective, no provision for his father was necessary in that will or deed. However, decedent's mother's will awards to her second husband a share equal to that of a brother or sister of decedent, if decedent should die without descendants. The intestacy laws would not thus provide for a step-parent.

[19] The federal tax is an estate and not an inheritance tax; it is therefore concerned with the existence of a transfer of ownership benefits and not with the particular persons who are the transferees.

alienation and limitations as to the use of the income during his lifetime or until he reached the age of 28.[20] Under the rationale of the *Clifford* case, therefore, decedent, who was for all practical purposes the owner of the trust property at the time of his death, was properly treated as its owner for tax purposes.[21]

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[20] It is true that, had decedent been a fee owner, his creditors could have reached the trust property under state law while they could not do so under the provisions of the trusts unless the decedent exercised his powers of appointment. See *United States* v. *Field*, 255 U. S. 257. This fact, however, is not material for present purposes. This Court found ownership for federal tax purposes in the *Clifford* case even though the taxpayer's creditors could not there reach either the trust property or the income. See also *Helvering* v. *Horst*, *supra*; *Harrison* v. *Schaffner*, *supra*. It should also be noted that, by statute in some states, creditors of the possessor of a general testamentary power of appointment can reach the property subject to the power even though the power is unexercised. Glenn, *Fraudulent Conveyances and Preferences* (Rev. ed. 1940), Sections 159, 160. It should be noted, too, that in bankruptcy property which is subject to a general power exercisable *inter vivos* is available to creditors of the donee of the power. See *Cohen* v. *Samuels*, 245 U. S. 50.

[21] The dislocation of burden which would result if the estate tax on property subject to a power were collected from the estate of the donee of the power rather than the subject property is no greater than it may be under Section 302 (f), when the power is exercised, or Section 302 (b), (c), (d), or (e). The tax may, and in the instant case would be, collected out of the subject property. Section 315 (a) of the Revenue Act of 1926, as amended.

4. THERE IS NOTHING IN THE STRUCTURE OR LEGISLATIVE HISTORY OF THE ESTATE TAX LAW, OR IN THE DECISIONS AND REGULATIONS CONSTRUING IT, WHICH PREVENTS APPLICATION OF THE *CLIFFORD* RULE TO THE PRESENT CASE

The court below held Section 302 (a) inapplicable, not on the ground that decedent's rights in and to the trust property were substantially less than those of a fee owner, but on the ground that the term "interest" refers only to property to which the decedent has technical title and which therefore passes upon his death by will or intestacy. That ruling, as we have pointed out, cannot be harmonized with the rationale of the *Clifford* case. And none of the considerations to which the court below adverted in its opinion to support its conclusion justified its refusal to apply the *Clifford* doctrine.

A. The court below was influenced by the fact that Section 302 (f) of the Revenue Act of 1926 expressly provides for the inclusion in the gross estate of the decedent of the value of property passing pursuant to the exercise of a power of appointment. The court reasoned that the specific provision made by Congress for property passing under an exercised power is an indication that Congress did not intend to tax property subject to an unexercised power.

The history of Section 302 refutes this view. The provision which is Section 302 (a) of the 1926 Act first appeared in 1916 (Section 202 (a) of the Revenue Act of 1916); as originally enacted, it provided for the inclusion in gross estate of only

such interests in property as were subject to the payment of charges against the decedent's estate and the expenses of its administration, and which were subject to distribution as part of the estate.[22] The provision which is Section 302 (f) of the 1926 Act first appeared in 1918 (Section 402 (e) of the 1918 Act) and, in the words of the Committee Report, was added to the law "for the purpose of clarifying rather than extending the existing statute." H. Rep. No. 767, 65th Cong., 2d sess., p. 21.[23] Eight years later, Section 302 (a) was amended by the Revenue Act of 1926 so as to include any property interest which the decedent had at the time of his death, irrespective of whether the interest was chargeable with decedent's debts and the expenses of administering his estate, and irrespective of whether it passed as part of his estate (Section 302 (a) of the Revenue Act of 1926).[24]

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[22] See note 8, p. 23, *supra*.

[23] The Committee Report also states (p. 21): "A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner."

[24] The Committee Report pertaining to Section 302 (a) of the Revenue Act of 1926 sheds little light on the breadth of the change made. See H. Rep. No. 1, 69th Cong., 1st sess., p. 15. The amendment was not, as is sometimes believed, caused by the decision in *Crooks* v. *Harrelson*, 282 U. S. 55, holding that Missouri real estate was not covered by Section 402 (a) of the Revenue Act of 1918 because it was not subject to administration expenses. The decision in that case was not rendered until 1930; the District Court's decision was not rendered until September 13, 1928 (28 F. (2d) 510).

In view of this legislative history, it seems clear that the existence of the specific provision in Section 302 (f) does not limit the scope of the general provision in Section 302 (a). To establish the contrary, respondents must contend that Congress did not intend the combination of rights possessed by this decedent to constitute an "interest" within Section 302 (a) because, when it amended Section 302 (a) so as to broaden its scope and to make it susceptible of literal application to such a combination of rights, it failed at the same time to strike out a previously enacted provision covering part of the same field. Such a contention, we submit, does not accord with the realities of the law-making process.

Certainly the mere fact that, as we construe Section 302 (a), it overlaps Section 302 (f) does not prove that our construction is erroneous. In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, for example, this Court held that property transferred in trust subject to a power of revocation was to be included as a gift intended to take effect at death within the meaning of Section 402 (c) of the 1921 Act, even though a specific provision had been inserted in the 1924 Act to cover such a case. Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 302 (d). In other words, the Court recognized that the various subdivisions of Section 302 are not mutually exclusive.

The same approach was taken in *Burnet* v. *Guggenheim*, 288 U. S. 280, where the Court held that a transfer with a reserved power of revocation in the grantor was not subject to gift tax while that power existed, but became so when the power was surrendered. This conclusion was based upon the general provisions of the 1924 gift tax law (Sections 319, 320); it was reached despite the fact that in the 1932 gift tax law there was a specific provision covering the situation (Section 501 (c)) which, by virtue of the construction placed upon the basic provision, became superfluous. See *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 45 note.[25]

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[25] See also *Higgins* v. *Smith*, 308 U. S. 473; cf. *Douglas* v. *Willcuts*, 296 U. S. 1, 10; *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 384; *McCauley* v. *Commissioner*, 44 F. (2d) 919, 920 (C. C. A. 5th); *O'Donnell* v. *Commissioner*, 64 F. (2d) 634, 635 (C. C. A. 9th) certiorari denied, 290 U. S. 699.

We do not believe *Porter* v. *Commissioner*, 288 U. S. 436, is to the contrary, despite the reliance placed upon it by the court below. That decision held that the grantor of a trust who had reserved the power to amend it, but not to revoke it in his own favor, was constitutionally subject to estate tax under Section 302 (d) of the 1926 Act, although the trust was created before the enactment of that provision. By way of dictum the Court said (p. 442) that Section 302 (a) standing alone did not "extend to the transfers brought into the gross estate by (d)." Since the Court was considering the question whether subsection (d) was limited by subsection (a) we do not think this dictum can be taken to mean more than that subsection (a) does not extend to all of the transfers covered by subsection (d). If, however, the dictum is

Helvering v. *Clifford*, *supra*, is also persuasive authority in support of our position on this aspect of the case, for the statutory provisions there involved are in many respects comparable to those here involved. In that case the Court held that the income of a short-term trust, of which the grantor's wife was beneficiary, was taxable to the grantor under the general provisions of Section 22 (a) of the Revenue Act of 1934, despite the fact that Sections 166 and 167 of that Act specifically dealt with taxation to the grantor of income from various types of trusts (not including, however, income from a short-term family trust)[26] and despite the fact that the construction given to Section 22 (a) rendered the special provisions of Sec-

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to be interpreted as meaning that subsections (a) and (d) must be so construed as to eliminate any overlapping, it is, we submit, out of harmony with the weight of authoritative decisions by this Court.

Particular doubt is thrown upon the dictum in the *Porter* case by the subsequent decision of this Court in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39. There the Court held that, for gift tax purposes, a gift is not complete if a power to change beneficiaries is reserved, even though the power may not be exercised in favor of the donor, and that when such a reserved power is relinquished a taxable transfer occurs. Since the gift tax statute is cast in terms similar to Section 302 (a) of the estate tax law and contains no provision comparable to Section 302 (d), the decision in the *Sanford* case cannot easily be reconciled with the dictum in the *Porter* case.

[26] See *Helvering* v. *Wood*, 309 U. S. 344.

tions 166 and 167 in large measure superfluous.[27] With respect to this matter, the Court stated (309 U. S. at 337–338):

> We should add that liability under § 22 (a) is not foreclosed by reason of the fact that Congress made specific provision in § 166 for revocable trusts, but failed to adopt the Treasury recommendation in 1934, *Helvering* v. *Wood, post,* p. 344, that similar specific treatment should be accorded income from short term trusts. Such choice, while relevant to the scope of § 166, *Helvering* v. *Wood, supra,* cannot be

[27] For instance, a trust with a power of revocation reserved to the grantor who is trustee and whose immediate family are beneficiaries is quite evidently taxable under Section 22 (a), although it is specifically covered by Section 166. This and other examples of the overlapping between the general and special provisions will be found in the following cases: *First Nat. Bank* v. *Commissioner*, 110 F. (2d) 448 (C. C. A. 7th); *Cox* v. *Commissioner*, 110 F. (2d) 934 (C. C. A. 10th), certiorari denied, 311 U. S. 667; *Reuter* v. *United States*, 34 F. Supp. 1014 (C. Cls.), certiorari denied, 312 U. S. 695; *Reuter* v. *Commissioner*, 118 F. (2d) 698 (C. C. A. 5th); *Helvering* v. *Dunning*, 118 F. (2d) 341 (C. C. A. 4th), certiorari denied, October 13, 1941, No. 114, present Term; *White* v. *Higgins*, 116 F. (2d) 312 (C. C. A. 1st); *Kraft* v. *Commissioner*, 111 F. (2d) 370 (C. C. A. 3d), certiorari denied, 311 U. S. 671; *Whiteley* v. *Commissioner*, 120 F. (2d) 782 (C. C. A. 3d), certiorari denied, October 13, 1941, No. 516, present Term; *Helvering* v. *Elias*, 122 F. (2d) 171 (C. C. A. 2d), certiorari denied, December 8, 1941, No. 728, present Term; *Commissioner* v. *Buck*, 120 F. (2d) 775, 779, note 3 (C. C. A. 2d).

> said to have subtracted from § 22 (a) what was already there. Rather, on this evidence it must be assumed that the choice was between a generalized treatment under § 22 (a) or specific treatment under a separate provision (such as was accorded revocable trusts under § 166); not between taxing or not taxing grantors of short term trusts. In view of the broad and sweeping language of § 22 (a), a specific provision covering short term trusts might well do no more than to carve out of § 22 (a) a defined group of cases to which a rule of thumb would be applied. The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of § 22 (a).

The same approach should, we think, be adopted here, for Section 302 (a), like Section 22 (a), is obviously designed as a catch-all provision, with Section 302 (f), like the comparable Sections 166 and 167 of the income tax law, simply carving out of Section 302 (a) "a defined group of cases to which a rule of thumb should be applied." In the present type of situation there is no such rule of thumb, but, as the Court pointed out in the *Clifford* case, that means simply that there must be a determination on the facts of each case whether the decedent should be treated

as the owner at the time of his death for purposes of Section 302 (a).[28]

B. The decision of this Court in *United States* v. *Field*, 255 U. S. 257, which was the authority principally relied upon by the court below is, we believe, distinguishable. The decedent in that case was the life beneficiary of a trust and also had a general testamentary power to appoint the income from the trust property which would accrue between the date of her death and the termination of the trust; she had no power, however, to dispose of the property itself. By her will she appointed the right to receive the income. The Commissioner sought to include the value of that right in the decedent's gross estate under Section 202 (a) of the Revenue Act of 1916, a predecessor section of Section 302 (a), which, however, as we have pointed out, specifically referred only to an interest of the decedent "which after his death is

[28] Mr. Justice Douglas referred to the ownership question as one "for the triers of fact." In the present case all of the pertinent facts appear in the basic trust instruments which are of record. The question raised by our contention simply involves the application of the statute to the known facts. This is a question of law. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481; *Deputy* v. *DuPont*, 308 U. S. 488, 499; *Harrison* v. *Schaffner*, 312 U. S. 579; *Commissioner* v. *Buck*, 120 F. (2d) 775, 779 (C. C. A. 2d); *Rubinkam* v. *Commissioner*, 118 F. (2d) 148 (C. C. A. 7th); cf. *Crabb* v. *Commissioner*, 121 F. (2d) 1015 (C. C. A. 5th); *Commissioner* v. *Goulder* (C. C. A. 6th), decided December 2, 1941, not yet reported; but may be found in 1941 C. C. H., Vol. 4, par. 9777.

subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." At the time of the death of the decedent involved in the *Field* case, there was no provision of the estate tax law comparable to the present Section 302 (f), expressly requiring the inclusion of property passing pursuant to the exercise of a general power.

This Court held that the value of the right was not includible in the decedent's gross estate. The Court pointed out that under Section 202 (a) of the 1916 Act property rights were not taxable unless three conjunctive conditions were met, namely, (1) that the decedent had an interest at the time of his death, (2) that, after his death, this interest was subject to the payment of charges against his estate and the expenses of its administration, and (3) that the interest was subject to distribution as part of his estate. Since the property which passed pursuant to the decedent's exercise of her power did not pass as part of her estate and was not subject to the payment of her debts, the Court concluded that the limiting conditions of the statute were not met and that the transfer was therefore not taxable. Since these limiting conditions were deleted in the 1926 Act here applicable, we do not believe that the *Field* case can fairly be regarded as authority against our position.

There are, it is true, two isolated statements in the *Field* opinion which furnish some support for the view, expressed by the court below, that the decision in that case was rested, not only on the ground that the property subject to Mrs. Field's power did not pass as part of her estate and was not subject to the payment of her debts, but also on the broader ground that Mrs. Field had no "interest" in the property in the statutory sense. These statements are that "the existence of the power does not of itself vest any estate in the donee" (p. 263) and that the "interest in question" was not "property of Mrs. Field at the time of her death" (p. 264). We do not believe, however, that these two statements can be magnified into a holding that one who has a combination of rights such as that possessed by decedent here has no "interest" in the property subject to the power, particularly in the light of the emphasis placed in the opinion upon the view that the statute was rendered inapplicable by reason of its limiting conditions.

But even if the decision is to be so construed, it is distinguishable. For the "interest" which was referred to in Section 202 (*a*) of the 1916 Act was an interest "which" was qualified by the restrictions we have mentioned. Removal of the restrictions in the 1926 Act accordingly served to broaden the meaning of the word "interest"; indeed, unless it served to do so, the deletion of the limiting con-

ditions would have been largely ineffective. Consequently, a holding that the decedent in the *Field* case had no "interest" within the meaning of Section 202 (a) of the 1916 Act would not be authority for the proposition that she would have had no interest in the broader sense of that word as it appears in Section 302 (a) of the 1926 Act.

We believe, therefore, that the decision of the court below finds no support in the *Field* case. But if we are in error as to this and the *Field* case is properly to be construed as ruling that the term "interest," even as used in Section 302 (a) of the 1926 Act, applies only to a legal or equitable title in property, then the decision, we believe, is wrong in principle and should be overruled. For, so construed, the *Field* case is directly opposed to the subsequent decisions of this Court in the *Clifford* case and in the other cases which we have cited, to the effect that taxation is concerned with the control or transfer of economic benefits to property rather than with the technicalities of title, and that, therefore, one who has all the substantial attributes of ownership must, for tax purposes, be treated as owner altogether. See pp. 20–23, *supra*.

C. The court below was also influenced (R. 49) by decisions interpreting Section 302 (f) in which the present contention of the Government might have been made, but was not. *Helvering* v. *Grinnell*, 294 U. S. 153; *Morgan* v. *Commissioner*, 309 U. S. 78; *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4th); *Rothensies* v. *Fidelity*

Philadelphia Trust Co., 112 F. (2d) 758 (C. C. A. 3d). These cases are not precedents in any way decisive of the present controversy concerning the proper construction of Section 302 (a), for the very reason that the question was not there raised or considered. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14.[29]

D. The court below referred to Articles 13 and 24 of Treasury Regulations 80 (1937 edition) (Appendix, pp. 62–65, *infra*), as supporting its decision. Article 24 deals exclusively with the applicability of Section 302 (f) and is of no assistance in the interpretation of Section 302 (a). And there is nothing in Article 13 which attempts to pass upon the applicability of Section 302 (a) to rights of dominion and enjoyment such as those possessed by the decedent in this case. Statements in the fourth paragraph of that article to the effect that the gross estate should not include a life estate or any increment of value by reason of a contingent remainder which ceases at death, certainly are not significant, since they refer to isolated rights of a far less substantial character than those of the decedent here. It may be observed, too, that the 1937 edition of Regulations 80 has been superseded by a newer edition of estate tax regulations which are applicable to the present

[29] The mere failure to raise the question in those cases is not sufficient evidence of an administrative practice to be of any substantial weight in settling the present controversy. Cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39.

case and which omit these statements. Treasury Regulations 105, Section 81.13, Appendix, *infra*, p. 59.[30]

II

SOME PART OF THE PROPERTY ACQUIRED BY DECEDENT'S BROTHER AND SISTERS IN THE COMPROMISE MUST BE DEEMED TO HAVE PASSED TO THEM UNDER POWERS OF APPOINTMENT EXERCISED BY DECEDENT WITHIN THE MEANING OF SECTION 302 (f) OF THE 1926 ACT, AS AMENDED

Should this Court hold that we are wrong in our contention that the entire corpus of each trust

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[30] Respondents may seek to place some reliance on Article 2 of the 1937 edition of Treasury Regulations 80 (Appendix, p. 61, *infra*), which stated that "In addition to property passing under a will or the intestate laws, the gross estate for purpose of the estate tax includes" certain interests of the kind specified in the subsections of Section 302 which follow subsection (a). This statement was obviously not cast with a view of determining the precise scope of Section 302 (a) and would, therefore, be of little force even if applicable to the present case. The fact is, however, that this regulation was not in effect at the time of decedent's death, or, in fact, at any time prior to the promulgation of the 1937 edition. Article 2 of the 1934 edition of Regulations 80 (Appendix, p. 65, *infra*) began "The statute subjects to tax transfers resulting from the decedent's death" and then proceeded to discuss specific types of interests covered by the subsections following Section 302 (a). Article 2 of the 1926 and 1929 editions of Regulations 70 were similarly worded. And Section 81.3 of Treasury Regulations 105 (Appendix, p. 59, *infra*), which corresponds to Article 2 of the earlier regulations, has abandoned the 1937 form and provides, in substance, that in addition to interests in the property possessed by the decedent at the time of his death, the gross estate shall include certain specified types of transfers.

should be included in decedent's gross estate under Section 302 (a), the question would remain whether all or some part of the 37½ percent of the trust property allotted to decedent's brother and sisters in the compromise should be included in his gross estate under Section 302 (f), as property passing pursuant to exercised powers of appointment. We think that it should be so included because decedent, in his New York will, sought to exercise his powers of appointment in favor of his brother and sisters, and they received a share of the trust property in the compromise, in part, at least, by asserting their rights as appointees under that will. Under the controlling decision of this Court in *Lyeth* v. *Hoey*, 305 U. S. 188, that part of the trust property received by the brother and sisters in the compromise through the assertion of their claims as appointees must be treated as though it passed pursuant to an effective exercise of decedent's powers.

In the *Lyeth* case an heir of a decedent contested the validity of the decedent's will in which no provision had been made for him. A compromise was entered into under which the will was probated and a specified sum paid to the heir. This Court held that the heir had acquired the property "by inheritance." The theory of the decision was that a person who had no standing to make a claim except as heir, and who acquired property by asserting that claim, must be considered as acquiring the property for tax pur-

poses in his capacity as heir. Similarly here, so much of what the brother and sisters obtained in the compromise by asserting their claim as appointees under decedent's will would seem, for tax purposes, to come to them as such appointees and, therefore, to have passed pursuant to exercised powers of appointment within the meaning of Section 302 (f).

The court below attempted to avoid the doctrine of *Lyeth* v. *Hoey* by determining (1) that the New York will was void; (2) that, since the will was void, nothing could have passed pursuant to the exercise of the powers of appointment in the will; and (3) that the compromise in fact repudiated rather than recognized the right to take by appointment. This approach, we believe, is a complete distortion of the *Lyeth* v. *Hoey* rule.

The brother and sisters asserted the validity of the will and their rights as appointees under the will in the North Carolina proceedings. Had they succeeded in their contention, they would have been entitled to the entire trust property; had their contention been rejected, and their alternative contention rejected as well, they would have received nothing. They preferred, as did the other parties to the proceeding, to compromise their claim rather than litigate it in the North Carolina courts. Certainly, in this situation, it is not for the federal court considering the tax consequences of the compromise to de-

termine, as did the court below, that one of the contentions compromised was without merit and therefore could not have contributed to the settlement. Under the doctrine of *Lyeth* v. *Hoey*, the brother and sisters, having claimed, in part at least, as appointees, and having acquired trust property by virtue of that claim, must be considered as taking as appointees even though the appointment now be deemed invalid. See *Thompson's Estate* v. *Commissioner*, 123 F. (2d) 816 (C. C. A. 2d); *Sage* v. *Commissioner*, 122 F. (2d) 480 (C. C. A. 3d), certiorari denied, January 5, 1942, No. 760, present Term; *Benfield* v. *United States*, 27 F. Supp. 56 (C. Cls.); *Markwell's Estate* v. *Commissioner*, 112 F. (2d) 253, 255 (C. C. A. 7th).

This would be entirely clear had the compromise taken the form of an agreement to probate the New York will, with the brother and sisters paying over to the other interested parties a portion of the property which they would then have received under the exercise of the powers in that will. Had this been done, it would plainly not have been the function of the Board of Tax Appeals, or the Circuit Court of Appeals in reviewing its decision, to relieve the estate from tax because under its own analysis of the facts and the local law the powers were not validly exercised. No different result should follow here simply because the compromise was carried out in a different form.

The view expressed in the opinion below that, since the New York will was void, it could not have been a factor in the compromise, is not supported by the record.[31] In its opinion approving the compromise, the Supreme Court of North Carolina refers (R. 115–116) to the question of—

> The validity and effect of the alleged will executed in New York by Zachary Smith Reynolds, as a basis of the offer of the brother and sisters of Zachary Smith Reynolds.

It is described as a "serious," "grave" and "troublesome" question, and as one of the "vital bona fide controversies" in the case (R. 115). This question is then discussed in detail (R. 115–117). The following quotations from the discussion are significant (R. 117):

> Zachary Smith Reynolds attempted to execute a will leaving his property to his

[31] If their claim as appointees was not a factor in the compromise, decedent's brother and sisters made an incredibly good bargain. Their alternative contention was extremely tenuous. It depended upon successful maintenance of each of the following points: that the judgment barring the Cannon child from participation in the trusts was valid; that the Reno divorce of Anne Cannon was invalid, although both parties and the Cannon child were represented at the divorce proceedings, and although both parties subsequently relied upon the decree by remarrying; that decedent's marriage to Libby Holman was bigamous and the Holman child therefore illegitimate; and that, being illegitimate, the Holman child could not be called decedent's "descendant," "issue," or "child" within the gift-over provisions of the trusts.

brother and sisters, as before stated. The brother and sisters make the offer of settlement. * * * This compromise judgment is not making a new will for R. J. Reynolds, but adjusting the differences brought about by his son, Zachary Smith Reynolds, attempting to do what under the wills and deed he had a right to do. * * *

In a previous case the Supreme Court of North Carolina had considered a dispute between the guardians of the Cannon child as to whether the judgment barring that child from participation in the trusts should be contested. *In re Reynolds*, 206 N. C. 276. The guardians were authorized to attempt to upset the judgment. In an opinion of Judge Clarkson it was stated that decedent's New York will was void. 206 N. C., at 290. However, the will was not at issue in that case and none of the other four judges concurred in that opinion. It was Judge Clarkson who wrote the subsequent opinion of the same court approving the compromise and stating that the validity of the New York will was a serious and bona fide question. With respect to his previous opinion, Judge Clarkson said in his second opinion (R. 128):[32]

In the former opinion of this Court (206 N. C., 276–290), on the appeal of the Cabar-

[32] The record in the present case has quotation marks misplaced. The above quotation is correct. *Reynolds* v. *Reynolds*, 208 N. C. 578, 630.

rus Bank and Trust Company, coguardian of Anne Cannon Reynolds II, we said in the main opinion: "The alleged will of Zachary Smith Reynolds appears to be inoperative and void." The wills and deed of the parents of Zachary Smith Reynolds gave him the right to make a will—exercising the power of appointment given him was one of the serious and *bona fide* questions that brought about the compromise. He made the will in controversy to his brothers and sisters, who made the "offer of settlement."

With such strong evidence that the argument for the validity of decedent's New York will contributed to the compromise shares obtained by the brother and sisters, it was not for the court below to decide that their entire shares were obtained by advancing the alternative argument.[a] The rela-

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[a] Evidence that the claim of valid appointment did not contribute to the settlement shares acquired by decedent's brother and sisters was found by the Circuit Court of Appeals in the order of the lower North Carolina court and of the Baltimore City Court approving the compromise (R. 51–52). Neither of those courts wrote an opinion. In the order of the Baltimore City Court it is expressly stated that decedent's New York will was invalid (R. 35). In the judgment of the lower North Carolina court there is similar language, together with a provision awarding to the brother and sisters, not outright, but in trust under their father's will, the settlement shares obtained by them in the trust property given decedent by that will (R. 89, 99–100). It is common knowledge, however, that such orders are generally drafted by counsel for the interested parties, who would

tive contribution of each of the two claims was a question of fact which could only be determined by the Board of Tax Appeals. *Helvering* v. *Rankin*, 295 U. S. 123, 131–132. The Board did not decide that question since it considered that the doctrine of *Lyeth* v. *Hoey* should under no circumstances be applied.

Consequently, if this Court rejects the contention of the Commissioner under Point I, *supra*, it should nevertheless remand the case to the Board of Tax Appeals with directions to determine what part of the compromise share of the brother and sisters of decedent was obtained by asserting the validity of decedent's New York will as an exercise of the powers of appointment granted to him. *Helvering* v. *Rankin*, *supra*. The Board of Tax Appeals should be instructed that the portion of the property thus ascertained is to be included as part of the decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended.

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naturally be inclined to minimize any factors likely to increase federal taxes.

The opinion of the Supreme Court of North Carolina, whose duty it was to protect the infant children of decedent, is the only reliable touchstone for appraisal of the factors contributing to the compromise. As pointed out, that court rested its approval very heavily upon the claim of the brother and sisters to be the appointees under a valid will of decedent. Clearly that opinion is of far more significance than the order of the lower court which it affirmed, or the order of the Baltimore Court which, without re-examining the merits, merely adopted the compromise which it had approved.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX

Treasury Regulations 105:

SEC. 81.3. *Gross estate.*—In addition to the general provisions of subsection (a) of section 811 requiring the inclusion in the gross estate of property (except real property situated outside the United States) to the extent of the interest therein of the decedent, other subsections of section 811 more specifically include the gross estate for the purpose of the estate tax as more fully explained hereafter in these regulations, certain transfers made during the decedent's life without an adequate and full consideration in money or money's worth, joint estates with right of survivorship, tenancies by the entirety, life insurance even though payable to beneficiaries other than the estate, property over which the decedent exercised a general power of appointment and dower or curtesy of the surviving spouse or statutory estate in lieu thereof. * * *

SEC. 81.13. *Property of decedent at time of death.*—It is designed by the foregoing provisions of the Internal Revenue Code that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

All real property situated in the United States and owned by the decedent at the

date of his death is included in the gross estate, whether the decedent was a resident or a nonresident, a citizen or not a citizen, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. All personal property owned by the decedent at the date of his death is included in the gross estate, regardless of its situs. However, in the case of a decedent who was a nonresident not a citizen, only the property situated in the United States is included in the net estate and property situated outside the United States need not be disclosed unless deductions are claimed or such information is specifically requested. (See sections 81.52, 81.53, 81.54, and 81.66.) As to the situs of the personal property of decedents who were nonresidents not citizens, see section 81.50.

* * * * * *

SEC. 81.24. *Property passing under general power of appointment.*—Property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor), if the power is exercised by will. It should also be so included if the power is exercised by deed or other instrument either (1) in contemplation of death, (2) with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power, (3) with the retention or reservation by the decedent of the use, possession, right to the income, or other enjoyment of the transferred property, or (4) with the retention or reservation by the decedent of the right to designate the per-

son or persons who shall possess or enjoy the transferred property or the income thereof. (For description of such transfers and the taxability thereof with reference to when made and when the death occurred, see sections 81.16, 81.17, 81.18, and 81.19.) The statute, however, does not require inclusion in the gross estate of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors. Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with Form 706 in all cases, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required. The copies must be filed even though it is contended that the power was a limited one and the property passing thereunder is not returned for tax.

Treasury Regulations 80 (1937 edition):

ART. 2. *Transfers and interests reached.*—In addition to property passing under a will or the intestate laws, the gross estate for the purpose of the estate tax includes, as more specifically explained hereafter in these regulations, certain transfers made during the decedent's life without an adequate and full consideration in money or

money's worth, joint estates with right of survivorship, tenancies by the entirety, life insurance even though payable to beneficiaries other than the estate, property over which the decedent exercised a general power of appointment, and dower or curtesy of the surviving spouse, or statutory estate in lieu thereof.

* * * * * *

ART. 13. *Property of decedent at time of death.*—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

If the decedent died prior to 10:25 a. m., eastern standard time, February 26, 1926, the test which determines that a given interest is to be included in the gross estate under the provisions of subdivisions (a) of the corresponding sections of the Revenue Acts prior to that of 1926 is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of 1926.

All real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, a citizen or an alien, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs

or devisees. If the decedent was a resident (or a nonresident citizen who died after the enactment of the Revenue Act of 1934), all personal property owned by him should be included, wherever situated. If the decedent was a nonresident alien (or, regardless of citizenship, was a nonresident who died prior to the enactment of the Revenue Act of 1934), so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See articles 52 to 54). As to the situs of the personal property of nonresident alien decedents, or nonresident decedents, regardless of citizenship, who died prior to the enactment of the Revenue Act of 1934, see article 50.

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder in the case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of an interest or an estate limited for the life of the decedent. There should be included, however, the value of a reversionary interest retained by the decedent, which reverts upon the termination of a particular estate or in case of his prior death passes to others. There should also be included the value of an annuity payable to, or an interest or an estate vested in, the decedent for the life of another person who survives him. For rules in valuing such remainders, annuities, and interests or estates *pur autre vie*, see article 10 (*i*).

* * * * *

ART. 24. *Property passing under general power of appointment.*—Property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor), if the power is exercised by will. It should be so included if the power is exercised by deed or other instrument in contemplation of death. It should also be so included if the power is exercised by deed or other instrument with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power. (For description of transfers made in contemplation of death and transfers included in the phrase, "intended to take effect in possession or enjoyment at of after * * * death," and the taxability thereof with reference to when made and when the death occurred, see articles 16, 17, 18, and 19.) The statute, however, does not require inclusion in the gross estate of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors. Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with Form 706 in all cases, unless the decedent was a nonresident, in which case only one copy of

each instrument, certified or verified, is required.

Treasury Regulations 80 (1934 edition):

ART. 2. *Transfers and interests reached.*—The statute subjects to tax transfers resulting from the decedent's death. Except bona fide sales for an adequate and full consideration in money or money's worth, it also subjects to tax transfers made by the decedent in his lifetime (1) if made in contemplation of death; or (2) if intended to take effect in possession or enjoyment at or after his death, as for example, in the case he retained the income of the transferred property or the right thereto for his life, or for any period not ascertainable without reference to his death, or for any period of such duration as to evidence an intention to retain the enjoyment throughout his life; or (3) if he retained for any such period, either alone or in conjunction with any other person or persons, the right to designate those who should possess or enjoy the transferred property or the income therefrom; or (4) if at his death the enjoyment of the transferred property was subject to any change through the exercise of a power by him alone or in conjunction with any other person or persons to alter, amend, or revoke, or in the case such a power was relinquished by him in contemplation of his death.

There are also subject to tax the homestead and other exemptions; dower, curtesy, or statutory estate in lieu thereof, of the surviving spouse; property held by the decedent and another person or persons if the survivor or survivors take by right of survivorship; property passing under a

general power of appointment exercised by the decedent; insurance receivable by the executor under policies taken out by the decedent upon his life, and insurance so taken out and receivable by all other beneficiaries to the extent that the aggregate amount thereof exceeds $40,000.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, AND DEED OF KATHARINE S. JOHNSTON AND DECREE OF SUPERIOR COURT OF FORSYTH COUNTY N. C., ETC.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
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ESTATES ADMINISTRATION, INC., ADMINISTRATOR ESTATE OF ZACHARY SMITH REYNOLDS, DECEASED.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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OPINIONS BELOW

As stated in the petition for certiorari the findings and opinion of the Board of Tax Appeals are contained in pages 1 to 46 of the printed record filed with the application for certiorari, and are reported in 42 B. T. A. 145. The case was reviewed by the entire Board

(R. p. 46), with no dissent. The affirming opinion o the Circuit Court of Appeals, likewise unanimous (R pp. 60-72), is reported in 121 F. (2nd) 307.

STATUTE AND REGULATIONS INVOLVED

As Zachary Smith Reynolds, the decedent, died on July 6, 1932 (R. p. 2), the statute applicable is the Revenue Act of 1926, Section 302, as correctly quoted on p. 3 of the petition for certiorari.

The Treasury Regulations in point are correctly quoted in the Appendix to the petition for certiorari and include articles 10, 11 and 24 of Treasury Regulations No. 80. These articles are however identical with the same numbered articles in Regulations No. 70, adopted after the passage of the law of 1926 and made effective January 1, 1927.

GROUNDS FOR CERTIORARI ALLEGED

The two grounds of error alleged are:

1. That an equitable life estate, plus a general power of testamentary appointment (or as elsewhere more vaguely stated by Petitioner, the "bundle of rights" which the decedent had at the time of his death, in the present case) should be held for purposes of estate tax under Section 302 (a) as equivalent to outright ownership by the decedent;

2. That under the decision in *Lyeth vs. Hoey*, 305 U. S. 188, some unascertained part of the 37½% allotted by the compromise in trust for the brother and sisters of the decedent should be considered as having been acquired by virtue of the attempted exercise of the power of appointment and therefore taxable under Section 302 (f) as property passing by exercise of a general testamentary power.

ARGUMENT

The case on the merits as to these two points is quite fully discussed and set forth in the opinion of the Circuit Court of Appeals (R. pp. 60-72; *Helvering vs. Safe Deposit Co., etc.*, 121 F. (2nd) 307). We do not propose to here discuss the case on the merits; beyond such extent as may be necessary to show that neither of these grounds presents any reason why this Court should take these questions up for review; the case presenting none of the situations which are set forth in Rule 38 (f) as indicating the character of reasons which will be considered on an application for certiorari.

I

The claim that an unexercised power of testamentary appointment plus an equitable interest (which terminated at the death of the decedent) in the property subject to the power, may be considered as substantially equivalent to outright ownership; and therefore as being part of a decedent's "gross estate" under Section 302 (a).

This contention was made in this form for the first time in Petitioner's brief on appeal to the C. C. A., four and a half years after the institution of the case by petition to the Board, and nearly nine years after the death of the decedent against whose estate the claim is asserted. The opinion of the Board of Tax Appeals (R. pp. 1-46) which discusses all of the claims advanced before that tribunal, shows that the present contention was not there asserted.

It is said in Petitioner's application (p. 10) that "the importance of the case derives more particularly from the similarity of the Reynolds trusts to innumerable other trusts, in which property of incalculable value has been placed, the taxability of which will be affected by

the decision here"; and again on p. 11 that "the decision will have a far reaching effect upon the revenues, since it will remove from the scope of the estate tax all property subject to trusts of this kind, when the power of appointment is not exercised". It is further frankly stated that "This is the first case in which the Government has sought to apply Section 302 (a) to a trust of the type herein involved." And that "there is, therefore, no direct conflict between the decision of the Court below and any decision of this Court or of any other Circuit Court of Appeals."[1]

This means that although the statute has remained in its present form at least since 1926, that the Department or Government has never asserted any similar claim, although the principle now invoked would apply to "*innumerable* other trusts, in which property of *incalculable* value has been placed."

And during this period of at least fifteen years for which the law has stood in its present form and, as stated by petitioner, innumerable similar trusts of incalculable value have been created, not only has no such claim been asserted by the Government in any reported case (including decisions of the Board of Tax Appeals); but so far as we are advised, no such claim against any estate has ever been asserted, or suggested in any ruling by the Department or even in any law magazine article. With all respect, therefore, the claim appears to be fantastic in its novelty; or what is commonly called an argument of desperation.

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[1]There is however, as clearly shown in the opinion of the Circuit Court of Appeals (R. p. 63, etc.; *Helvering v. Safe Deposit Co.*, 121 F. (2nd) 307-310, etc.), the most direct conflict and inconsistency of the claim now asserted, with former decisions of this Court and numerous decisions of Circuit Courts of Appeal.

None of the features mentioned in Rule 38 (f) as grounds which may induce this Court to review a case on certiorari, are present.[2] There is no conflict between the decision of the Circuit Court of Appeals in the present case, and the decisions of any other Court on the same matter; neither is any question of local law decided in a way which can be claimed to be in conflict with applicable local decisions. Neither can it be said to be true that the present case decides any question of Federal law which should be settled by this Court. Petitioner bases his claim on the proposition that the Court's decision on this point is "irreconcilable" (Pet., p. 14) with statements made in decisions of this Court, dealing with cases of taxability under other sections of the Revenue Laws; such as, for instance, the statute expressly making includible for estate tax purposes property which the decedent has settled in trust in his lifetime reserving

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[2]The amount of the Department's claim, swollen by eight years' interest (Pet., p. 9, note 3), is not one of the considerations indicated by the Rule as among those to be considered.

As stated by Mr. Chief Justice Taft in the opinion in *Magnum Import Co. vs. Coty*, 262 U. S. 159, 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."
>
> *Magnum Import Co. vs. Coty*, 262 U. S. 159, at p. 163.

Mr. Chief Justice Hughes in the address which he made to the annual meeting of the American Law Institute in May, 1934, referring to the great number of applications for certiorari that were made without substantial basis, said:

> "Applications are numerous in which there appears to

to himself substantial rights of possession or enjoyment; or dealing with the broad provisions of the income tax law, or with constitutional questions of what Congress or the States may constitutionally tax.

It is hardly necessary to call attention to the fact that the present case involves no trust created by the decedent. The trusts in question were created by his father and mother while he was still a young child.

The contention now made is moreover in direct conflict with the regulations of the Commissioner (Appendix to Petition for Certiorari, pp. 23-24) which expressly provide that "nothing should be included on account of a contingent remainder in case the contingency does not happen in the lifetime of the decedent and the interest consequently lapses at his death; nor should anything be included on account of an interest or an estate limited for the life of the decedent," and again that "only

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be no conflict of decision between the Circuit Courts of Appeals, or between Federal and State courts in cases where the latter should be controlling, and no real conflict with the decisions of the Supreme Court, and there is an utter absence of any good reason for asking our review. That review, we must emphasize, is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered. I commend to the Bar the provisions of Rule 38 of the Rules of the Supreme Court which deal comprehensively with this subject."

American Law Institute, Proceedings,
Vol. XI, p. 315.

In his address made before the same body in May, 1937, he reverted to the same subject and said that the purpose for which the writ was allowed was to carry out the intention of the Jurisdictional Act of 1925 in insuring the hearing of cases that are important in the interest of the law.

American Law Institute, Proceedings,
Vol. XIV, p. 34.

property passing under a general power should be included". What the Court is asked to do, contrary to all preceding authority and practice, is to establish the principle that the right to receive all or part of the income from a trust created by a third party, plus a general power of testamentary appointment,[3] or plus the

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[3]Petitioner argues in his application (note 7 on p. 16) that the decedent's inability under North Carolina law to exercise his powers of testamentary appointment until he attained twenty-one, was no different from the disability of a minor to will his own property, and was moreover an accidental restriction imposed by the law of his domicil, and therefore not inherent in his "basic power".

The appropriateness of the analogy sought to be drawn is not apparent. In this connection, however, it may be noted that Judge Clarkson in the opinion in the Cabarrus County case (as quoted in the opinion of the Board in the present case, R. pp. 25-27) said, after quoting the North Carolina statutes (do., p. 23), that it was to be inferred that R. J. Reynolds made his will with the North Carolina law in view, and that "no language gives the right of appointment under 21 years of age"; and further that "the wills of R. J. Reynolds and Katharine S. Johnston appear to indicate an intention that Zachary Smith Reynolds could only exercise the power of appointment after he became 21 years of age" (*Reynolds Guardianship*, 206 N. C. 276, at p. 290). And accordingly, in the Judgment in the Forsyth County case, it was found that "even if Zachary Smith Reynolds had the power to adopt a domicil of choice and execute a will in the State of New York which would affect his personal estate absolutely owned, such a will could not exercise the powers of appointment under the will of his father, R. J. Reynolds, and the will and deed of his mother, Katharine S. Johnston".

Rec. N. C. Proceedings, p. 671;
Reynolds vs. Reynolds, 208 N. C. 578 at p. 592.

If therefore he did not have such power before attaining 21, it would seem to be clear that at the time of his death he did not have a present power of testamentary appointment.

But as we have said, whether he did not have such a power, or had it but was "accidentally" restricted from exercising it, does not seem to be of any importance.

fact that had the decedent survived until he attained twenty-eight he might then have become entitled to receive the property absolutely under his father's will, or that any of the usual incidents of such trusts when coupled with a general power of testamentary appointment, require an investigation of whether such rights may not be substantially as beneficial as outright ownership. Any such suggestion of a *ratio decidendi* in such cases would leave the question involved in a legal fog, superadded by the Court to the plain provisions of the statute.

As pointed out in the opinion of the C. C. A. below (R. pp. 66-67; *Helvering vs. Safe Deposit Co.*, 121 F. (2nd) 307, 311-312, third paragraph of syllabus), the Federal estate tax originated as a tax on estates, as the word is used when we speak of the estate left by a deceased person; and all of the provisions including in the basis for taxation transactions which did not come strictly within this category, were added by express legislation, following decisions of this Court holding that the statute was not to be extended to include such cases. Whether or not Zachary Smith Reynolds' rights in the property subject to these trusts can be called generally an "interest", they were not rights which constituted any part of his "estate". At most it was, in the language of *May vs. Heiner*, 281 U. S. 238, 243, an interest possessed prior to death, which "was obliterated by that event", and did not survive as a part of his estate. Rights under limitations created by third parties, which are terminated by the beneficiary's death, manifestly constitute no part of the "estate" which he leaves for distribution after his death, and a greater injustice than

to tax his own estate for what is taken from him by his death can hardly be supposed.[4]

For purposes of argument we might accept the proposition that Zachary Smith Reynolds had a life estate plus a general power of testamentary appointment. In the great majority of cases where powers of testamentary appointment have been conferred they have been given to life beneficiaries (and this was true in substantially all of the cases cited in the opinion of the C. C. A. below involving the taxability of powers of appointment). He had, however, less than the equivalent of an equitable life estate, being entitled at most to have a very limited part of the income expended for his benefit prior to his attaining twenty-eight. The greater part of the income was to be accumulated and added to corpus, and made subject to the same limitations over.

In a recent case involving the rights of an elder brother of the present decedent as a beneficiary under his father's will, it was decided by the Circuit Court of Appeals for the Fourth Circuit, upon a thorough consideration of North Carolina decisions and upon the decisions of the North Carolina Supreme Court dealing with the pro-

[4] We do not intend to here suggest the constitutional question of the power to do so; but it may be noted as emphasizing the proposition that Federal Tax is normally imposed upon the "estate" of a decedent, that in the case in which it was decided by this Court that a State might constitutionally tax under an *inheritance* tax law, property passing under non exercise of a power of appointment, the decision in *Nichols vs. Coolidge*, 274 U. S. 531, that passage of title under trusts created prior to the passage of the Federal Estate Tax Law could not constitutionally be so taxed, was expressly distinguished from the case before the Court upon the ground that the State Tax was an inheritance tax imposed upon the donee's privilege of succession, and not, like the Federal Estate Tax, a tax upon the donor's estate.

Saltonstall vs. Saltonstall, 276 U. S. 260, 270-271.

visions of his father's will, that the testator's children took no vested estates until they should respectively attain twenty-eight; but a contingent remainder of principal to them in the event that they should survive until the age of twenty-eight.

Reynolds vs. Commissioner, 114 F. (2nd) 804.

While this case was reversed on the Federal question involved, this Court confined the review on certiorari to the Federal question and declined to take up any question of State law presented.

Helvering vs. Reynolds, 312 U. S. 672 (Grant of Certiorari);

Helvering vs. Reynolds, 313 U. S. ——; 61 Sup. Ct. Rep. 971.

The circumstance that Zachary Smith Reynolds would have become entitled to receive the principal under his father's will if he had survived until a future date was present in the case of *Morgan vs. Commissioner*. A full statement of the terms of the trusts involved in that case are set out in the opinion of the Circuit Court of Appeals below (*Morgan vs. Commissioner*, 103 F. (2nd) 636), but are sufficiently summarized in the opinion of this Court where it is said: "suffice it to say that under each" (of the trusts involved), "property remaining in the Trustee's hands for Elizabeth S. Morgan was given at her death to the appointee or appointees named in her will, with gifts over in case she failed to appoint".

Morgan vs. Commissioner, 309 U. S. 78, 79.

So, too, in *Helvering vs. Grinnell* the will had the feature relied upon by Petitioner in the present case (Pet. p. 5) that in default of the exercise of the power of appointment the trust property was to go to those per-

sons who might be considered as the natural objects of the donee's bounty. In the Grinnell case the decedent's share was limited in default of exercise of her power of appointment, to go to her children or issue, or alternatively to her next of kin.

Helvering vs. Grinnell, 294 U. S. 153, 154.

In conclusion therefore it is submitted, on this point, that no Federal question which has not already been abundantly settled by decisions of this Court as well as by numerous decisions of Circuit Courts of Appeals, and long-continued practice or usage, including express provisions in the Commissioner's Regulations, exists such as would induce this Court to take up so plain a question for review.

II

The claim that anything in the decision of this Court in Lyeth vs. Hoey, 305 U. S. 188, furnishes any ground for claiming that the amount of estate tax is affected by any subsequent compromise or agreement among the parties interested.

The second question which this Court is asked to take up has also none of the features indicated by Rule 38 (5) as considerations which may induce this Court to grant an application for certiorari. There is no conflict among the decisions of the Circuit Courts of Appeals on this question either before or subsequent to the decision of this Court in Lyeth vs. Hoey:

Robbins vs. Commissioner, 111 F. (2nd) 828, 831-2 (C. C. A. First Circuit, May 2, 1940);

Housman vs. Commissioner, 105 F. (2nd) 913 (C. C. A. Second Circuit, July 26, 1939); Certiorari denied, 309 U. S. 656;

White vs. Thomas, 116 F. (2nd) 147 (C. C. A. Fifth Circuit, December 5, 1940); Certiorari denied, 313 U. S. ——; 61 Sup. Ct. Rep. 1098.

These decisions were all subsequent to *Lyeth vs. Hoey;* and to the same effect is an earlier case:

Old Colony Trust Co. vs. Commissioner, 73 F. (2nd) 970, 971.

Apart from these decisions it is plain that the decision in *Lyeth vs. Hoey* furnishes no possible basis for a claim that a compromise of rights in an estate (in the present case arrived at many years after the basic date) should affect the incidence of estate tax, which attaches at the time of the decedent's death.

Lyeth vs. Hoey decided that property acquired in compromise of an alleged interest in an estate, which interest if realized would not have been taxable income, is exempt from taxation as income to the same extent as if the claim had been realized on in full.

Lyeth vs. Hoey, 305 U. S. 188.

From this it may be a fair inference that conversely amounts received in compromise of what would have been taxable income if received are taxable income. Income tax attaches as of the time of receipt of the income, but estate tax liability is determined as of the date of the death of the decedent, and subsequent transactions among the parties interested, or events, do not alter the incidence of the tax.

Moreover if the principle of *Lyeth vs. Hoey* were susceptible of any application to a compromise of interests in an estate, the rule would work both ways; and would apply equally to cut down the claims of the Government

in at least as many and probably more cases than it could operate to increase such claims.

The contention made with respect to this point by Petitioner (and substantially repeated in his present petition) was that the case should have been remanded to the Board for a finding of what the "proportionate contribution" of the claims asserted, to the compromise settlement was, and to take further evidence on that question (the State courts in their decisions approving the compromise having expressly declared and decided that the attempted exercise of the power of appointment was totally void).[5]

Any such conclusion as that so contended for would, like the first question sought to be raised, leave the situation in such cases in a legal fog, even if it were true that the New York will figured to any extent in the compromise. A more unsatisfactory method of determining

[5]It is suggested in a foot-note on page 21 of Petitioner's application, that unless the claim of the decedent's brother and sisters as appointees under the New York will was a substantial factor in the compromise, then they "made an incredibly good bargain", and that "their alternative contention was extremely tenuous". The suggestion is unimportant, but the contrary is obviously true. Any claim that the attempted appointment was valid had been practically disposed of by the North Carolina Supreme Court on the appeal in the Cabarrus County case (a bitterly contested case in which no concessions were made), decided before the compromise was suggested, in the language quoted from Judge Clarkson's opinion in that case by the Board in its opinion; R. p. 25 etc. "that the will of Zachary Smith Reynolds appears to be inoperative and void"; and in the petition submitting the suggested compromise (Record of North Carolina Proceedings, p. 147, etc.), in which the contentions of the several parties to the case are quite fully set forth, there is no mention of any claim under the New York will as constituting a valid appointment.

On the other hand the validity of the judgment barring the Cannon child and the validity of the Reno divorce, were the conditions which actually counted in the settlement. Whatever may be now suggested as to what would have been the

estate tax accruing at the death of the decedent, if there were any basis in the decisions for such a method, can hardly be imagined.

The compromise in the present case was, it should be noted, made effective by the two State Courts to which it was submitted. While suggested by the brother and sisters of the decedent, it was not a compromise which they had power to make, but one which only became effective by its adoption by the Court.

Moreover, as pointed out in the opinion of the C. C. A. below in the present case (R. p. 71), the thirty-seven and a half per cent which it is now claimed should be considered as in part allotted in satisfaction of a claim under the attempted appointment, was not allotted to the brother and sisters outright (as would have been the case if they had received it under an exercise of the power in the New York will); but was allotted to be added to the

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decision upon these two questions, they presented at the time most serious questions. The judgment was considered valid and proper not only by the prominent North Carolina lawyers who represented the parties at the time, but the Judge below in the Cabarrus County case thought it should not be attacked, and so decided or decreed (Rec. N. C. Proceedings, p. 58, &c.) and one of the Supreme Court Judges who sat on the appeal agreed with the Judge below in this respect.

What the situation before the Court and parties as to the question of the validity of the Reno divorce was, when the settlement was made, is quite apparent from the Record of that suit, which is included in full in the North Carolina Record (Rec. N. C. Proceedings, pp. 510-563); and from the account of how the divorce was obtained given by the lady chiefly concerned (do., p. 188-190), by her father (do., p. 611) and by her nurse (do., p. 651); all of which were before the Court when it entered the judgment effecting the settlement of these questions.

Reynolds vs. Reynolds, 208 N. C. 578, 592;
Cf. *Reynolds Guardianship*, 206 N. C. 276
(as quoted in opinion of Board, R. pp. 25-27);
Decree of Maryland Court, R. p. 52;
(quoted in opinion of C. C. A., R. p. 70).

shares already held in trust for them (with limitations over in the event of their death before attaining twenty-eight), or as the property would have passed in default of the exercise of the power of appointment under the terms of the father's will.'

The grounds for rejecting this contention are also more fully set forth in the opinion of the Circuit Court of Appeals below.

Helvering vs. Safe Deposit and Trust Company (R. pp. 70-72), 121 F. (2nd) 307, 314-315.

CONCLUSION

For the reasons above set forth it is respectfully submitted that the present case presents no substantial unsettled Federal question upon either of the two points sought to be raised, and that the Application for Certiorari should therefore be denied.

CHARLES McH. HOWARD,

Attorney for Respondents.

September , 1941.

No. 600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHARINE S. JOHNSTON, AND DEED OF KATHARINE S. JOHNSTON AND DECREE OF SUPERIOR COURT OF FORSYTH COUNTY, N. C., ETC.,
Respondent.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATES ADMINISTRATION, INC., ADMINISTRATOR ESTATE OF ZACHARY SMITH REYNOLDS, DECEASED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

As stated in Petitioner's Brief the findings and opinion of the Board of Tax Appeals are contained in

pages 1 to 31 of the printed record, and the case is reported in 42 B. T. A. 145. It was reviewed by the entire Board (R. p. 31), with no dissent. The affirming opinion of the Circuit Court of Appeals, likewise unanimous, is contained in pages 42-54 of the Record, and is reported in 121 F. 2d 307.

QUESTIONS PRESENTED

These are two, all other contentions previously made before the Board having been abandoned.

1. Subsection (a) of Section 302 of the Estate Tax Law was amended in the Revenue Law of 1926 by omitting the previous qualifying additions that an interest of decedent, to be includible in his gross estate, must be of such a nature that after his death it should be subject to the payment of the charges against his estate and the expenses of its administration, and subject to distribution as part of his estate; leaving the subsection to read:

> "Section 302(a). To the extent of the interest therein of the decedent at the time of his death."

It is claimed by Petitioner, relying principally upon some very general statements made in opinions of this Court dealing with the constitutional basis for taxation and with other provisions in the revenue laws, that the effect of omitting the above qualifying words, in such reenactment, was to vastly extend the scope of Section 302 and to make includible the value of property over which a decedent had a power of testamentary appointment (which was not exercised); and that the decedent (Zachary Smith Reynolds) in the present case had rights equivalent to substantial ownership; so that the entire value of the property over which he was given powers of testamentary appointment by his parents in

the three trusts involved should be included in ascertaining estate tax due by reason of his death.

2. It is further claimed by Petitioner that the principle of *Lyeth vs. Hoey*, 305 U. S. 188, requires that some part of the properties held in the three trusts involved in this case should be considered as having passed by exercise of a general power of appointment, because although the attempted appointment of Zachary Smith Reynolds while a minor and a resident of North Carolina has been found to be invalid, yet something must have been allowed or paid under the compromise ratified by the judgments of the North Carolina and Maryland Courts, in compromise of claims of those who would have been appointees under such attempted will.

Both of these claims are disputed by Respondents upon various grounds, which will be discussed in our argument.

STATEMENT

The statement of facts in Petitioner's brief is fairly complete, although the statements that the income from the trusts was to be devoted to decedent's support, maintenance and education until he reached twenty-one; and that in default of his exercise of his power of testamentary appointment and lack of descendants, the property was to go "to his brother and sisters and their issue per stirpes," are much too broad; but we are dealing with this in the subsection of our argument devoted to the question of the nature of the rights which the decedent had at the time of his death. So, too, the statement of additional facts with respect to the second question involved in this case is incorrect in stating that thirty-seven and a half per cent of the

estate was allotted to decedent's brother and sisters, but this also is covered in our subsequent discussion.

We desire however to call special attention to the following facts.

The power of appointment conferred by all three of the trust instruments was a power of testamentary appointment only, and did not authorize the decedent to make any disposition of any part of the three estates in his lifetime or by deed.

In all three of the instruments, subject to such power of testamentary appointment, the share in the trust estate was limited over upon his death under twenty-eight (in the case of Mrs. Johnston's two trusts, in case of his death at any time) upon limitations which provide for every possible event, so that all future interests were completely and minutely disposed of, subject only to the power of testamentary appointment conferred upon him under all three of the trusts.

We desire also to call attention to the fact that the present case has nothing in common with cases involving the question of when a decedent has created a trust or a limitation to take effect in possession or enjoyment at or after his death under Section 302(c). The trusts now in question were created by the parents of Zachary Smith Reynolds while he was but a young child. It may seem unnecessary to accentuate this fact; but we do so because many of the cases cited in Petitioner's brief are cases arising under that section, in which the question was whether a Settlor by a transfer made in his lifetime had retained such substantial rights as to make the transfer one intended to take effect in possession or enjoyment at or after his death.

SUMMARY OF ARGUMENT

We shall of course confine our argument to the two contentions made in Petitioner's brief, without noticing or mentioning the other questions which have been raised during the long pendency of this case but which are now abandoned; and in dealing with these two questions we shall arrange our argument under the following points or headings:

I. That Section 302(a) of the Revenue Act of 1926 (I. R. C. Sect. 811(a)) does not require the inclusion of property over which a decedent had a general power of testamentary appointment, or extend the scope of the section to cases where a court might think that decedent's rights were substantially as beneficial in their nature as outright ownership; nor had the decedent in the present case rights which in any sense can be said to be equivalent to substantial ownership.

1. The nature of the contention so made by Petitioner, or the issue before the Court.

2. The novelty of such a contention, which is totally contrary to the practice of over fifteen years since the Act of 1926 was passed. Such long established practice and administrative construction is alone a sufficient reason for rejecting Petitioner's present claim.

3. That any such contention is foreclosed by the decisions of this Court in *United States vs. Field*, 255 U. S. 257; *Porter vs. Commissioner*, 288 U. S. 436, and other cases. A power of testamentary appointment is not an estate or interest in the property subject to such power.

4. That the tax imposed by the law in question is primarily an estate tax (on the estates of decedents), and that the "interest" of decedent referred to in Subsection (a) means an interest in property owned by the decedent such as would normally constitute part of a decedent's estate.

5. That general expressions in the opinions of this Court, dealing with matters not related to the present question of statutory construction, are not to be taken as applicable to the construction of the statute now in question.

6. That the fact that Congress by the Revenue Act of 1926 in making the change in the wording of Section 302(a) which is relied on as having effected the hitherto unsuspected result now contended for, reenacted unchanged and without explanation the provisions of Section 302(f), taxing the *exercise* of a power of testamentary appointment, does indicate clearly that no such result as is now contended for was intended or contemplated.

7. That the decedent (Zachary Smith Reynolds) did not have rights under any of the three trusts involved which can be said to be substantially equivalent to ownership.

8. That to hold that the scope of Section 302(a) was broadened so as to include all cases in which a court may think that the rights of decedent were substantially as beneficial as outright ownership, would put the determination of such cases in a legal fog; and that if Congress had intended any such sweeping change it would have made some provision for defining or determining what the nature of the

interest in property not belonging to the decedent should be to justify its inclusion.

9. That the attempt to tax as part of a decedent's estate, the passage of title due to his death under limitations in trust settlements made before any law attempting to tax such devolutions was passed, would involve serious constitutional questions as to the validity of such an attempt, and that the existence of such questions is a sufficient reason for not assuming that any such result was intended by Congress, by the amendment of the law now invoked.

II. That the principle of Lyeth vs. Hoey, 305 U. S. 188, does not require that any part of the property held in these trusts should be included in determining estate tax, because of any disposition made of it in pursuance of the compromise made and ratified by the North Carolina and Maryland Courts.

1. Difference between income tax (accruing on date of receipt) and estate tax (accruing on date of death), in this respect.

2. That the compromise was made and effected by the judgments of the North Carolina Court and the Maryland Court, and that both Courts in ratifying the compromise expressly decided that the attempted appointment was invalid.

3. That the attempted New York will was relatively not of importance as a basis for the compromise.

4. That the thirty-seven and a half per cent compromise share in the R. J. Reynolds Estate, of which the surviving brother and sisters were beneficiaries

(and which it is now claimed was allotted in part in satisfaction of their claims under the New York will), was allotted to be added to the shares already held in trust for them under their father's will; that is, as it would have passed under the limitations of his will in default of appointment and issue; and hence could not have been allotted in whole or in part in satisfaction of any claim under the New York will, which would have appointed the property to his brother and sisters absolutely.

5. That the findings of the Board of Tax Appeals are as full and specific as the nature of the case admits of; and that to remand the case to the Board for a finding of to what per cent the attempted appointment by the New York will figured in the compromise finally arrived at; would require of the Board a task impossible of execution.

ARGUMENT

I

THAT SECTION 302(a) OF THE REVENUE ACT OF 1926 (I. R. C. SECT. 811(a)) DOES NOT REQUIRE THE INCLUSION OF PROPERTY OVER WHICH A DECEDENT HAD A GENERAL POWER OF TESTAMENTARY APPOINTMENT, OR EXTEND THE SCOPE OF THE SECTION TO CASES WHERE A COURT MIGHT THINK THAT DECEDENT'S RIGHTS WERE SUBSTANTIALLY AS BENEFICIAL IN THEIR NATURE AS OUTRIGHT OWNERSHIP; NOR HAD THE DECEDENT IN THE PRESENT CASE RIGHTS WHICH IN ANY SENSE CAN BE SAID TO BE EQUIVALENT TO SUBSTANTIAL OWNERSHIP.

POINTS

1. The nature of the contention advanced by Petitioner, or the issue before the Court.

Petitioner's contention may be resolved into two parts, both of which would have to be determined in Petitioner's favor, to justify a reversal in the present case, and these two contentions may be expressed or summarily explained as follows.

In the first place, it is contended that because Congress omitted in the Revenue Law of 1926 the previous qualifying words in Section 302(a) (which required that an interest to be included must be such as after the decedent's death is "subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate"); that the result was to vastly broaden the scope of Sub-section (a) so as to make an unexercised power of testamentary appointment such an interest. There was it may be noted abundant reason for repealing these additional qualifications, without supposing that Congress intended thereby to so vastly broaden the scope of the subsection as to include unexercised powers of appointment. They made the taxability of real estate depend upon minor differences in the laws of the different States, and resulted in the decision in *Crooks vs. Harrelson*, 282 U. S. 55, making the taxability of real estate dependent upon such insignificant considerations as whether the law of the State made administration expenses a charge on real estate if the personalty were insufficient to provide for the same. They also caused much similar difficulty in applying the estate tax law to community property under the different provisions of the States which recognized that species of property.

In the second place, the Commissioner claims that the rights which the decedent possessed at the time of his death (including especially power of testamentary appointment) were such that he had all the "substantial attributes of ownership" and that he must therefore be treated as an owner of the property for the purposes of Subsection (a).

In the succeeding subsections of this brief a number of answers to these contentions of the Petitioner are set forth, each of which, it is submitted, is separately and independently sufficient, so that if any one of the grounds advanced are sustained, it is destructive of the claim of Petitioner under this Item.

2. The novelty of Petitioner's contention, which is totally contrary to the practice of over fifteen years since the Act of 1926 was passed. Such long continued practice and administrative construction is alone a sufficient reason for rejecting Petitioner's present claim.

Perhaps the extreme novelty of the contention now advanced is its most striking feature.

During the period of over fifteen years which has elapsed since the enactment of the Revenue Law of 1926, no one has ever suggested even the possibility of such a contention before.

No reported case, of any Court or of the Board of Tax Appeals, and no ruling by the Department and no claim heretofore asserted by the Commissioner contains any intimation or suggestion of a possibility of such a contention or claim.

It presupposes that this Court, other courts, the Attorney General's office, the Commissioner and his counsel and advisers, were all engaged in a futile inquiry in cases such as *Helvering vs. Grinnell,* 294 U.

S. 153 (1935); *Morgan vs. Comm'r*, 309 U. S. 78 (1940); the case in the Fourth Circuit of *Legg's Est. vs. Comm'r*, 114 F. 2d 760 (1940); the case in the Third Circuit followed by the Fourth Circuit in the Legg case; viz, *Rothensies vs. Fidelity Trust Co.*, 112 F. 2d 758 (1940); all of which arose under the Act of 1926 or subsequent re-enactments and in all of which the donee of a general testamentary power had also the beneficial life interest in the property subject to the power. All of these cases should have been decided, if the contention now made were well founded, upon the simple ground that whether taxable or not under Section 302(f) as property disposed of by the exercise of a general power, the property in question was taxable under Section 302(a) because subject to such a power, and this would have resulted in a contrary result to that reached, except in the *Morgan* case, where the property in question was held taxable under Section 302(f).

In addition to the cases speciálly cited above there have been many other cases in the courts and before the Board, turning upon the question of whether a general power of testamentary appointment had been exercised, which are collected and cited in the general tax services such as C.C.H. 1941, Inheritance, etc., Tax Service (Fed.), para. 3468, which we have not thought it necessary to examine and classify and which were similarly decided. Nor has such a claim been asserted by the Commissioner heretofore in his Regulations or in the Departmental Rulings, nor so far as we are informed ever advanced or suggested by any text writer or contributor to the law magazines, before it was raised in the present case upon appeal to the C.C.A.

In the Commissioner's petition for certiorari in the present case (p. 10) the principal ground given why this Court should take the case up is alleged to be because of the similarity of the trusts involved in this case to "*innumerable* other trusts, in which property of *incalculable* value has been placed, the taxability of which will be affected by the decision here." (Italics supplied.)

In Petitioner's present brief (p. 19) it is stated that trust provisions of the type involved in this case, combining a life estate, testamentary power of disposition and a gift over provision in favor of the life beneficiary's children and next of kin in the event of non-exercise of the power of appointment, are in constant use.

Within less than a year after the passage of the Act of 1926 the Commissioner promulgated a new edition of the Estate Tax Regulations (No. 70, 1926 Ed., effective January 1, 1927) substantially identical with Regulations 80, which have since been continued in force and from which Articles 2, 13 and 24 are printed in Petitioner's present brief. They expressly provided (Art. 13, App. to Pet. Brief, p. 63) that it was designed by the foregoing provision of the statute (*i. e.*, by subsection a) to include in the gross estate all *property of the decedent* which was in the decedent at the time of his death; and that while the value of a vested remainder should be included in the gross estate, *nothing should be included on account of a contingent remainder in case the contingency does not happen in the lifetime of the decedent and the interest consequently lapses at his death*, and further that *nothing should be included on account of an interest or an estate limited for the life of the decedent*. And Art. 24 with

reference to powers of appointment (Do. p. 64) further provides that *only property passing under a general power should be included.* (Italics supplied.)

In neither case is the generality of the statement qualified by any proviso that if there be both a life interest and a general power of testamentary appointment, then the contrary of what the Regulations state may be true.

Again in 1937 Article 2 was amended so as to read as set forth on p. 61 of Petitioner's brief; and as so amended it indicates even more clearly than before that Subsection (a) was intended to cover the ordinary case of property of the decedent passing by will or under the intestate laws; as it first states that "in addition to property passing under a will or the intestate laws," the estate should include certain other kinds of properties, which it enumerates and which comprise the transfers reached by Subsection (b), (c), etc., following Subsection (a).

In Petitioner's brief (Note 30, p. 50) it is argued that since these provisions in the 1937 Regulations were not in effect at the time of decedent's death, that therefore they have no application in the present case. But the Regulation interpreted Section 302(a) of the Act of 1926, and the form assumed in the 1937 Regulations (and only since altered by Regulations adopted in the last few days) represents the deliberate judgment of the Commissioner after ten years' practice under the Act and ample time to consider its scope and application.

Recent decisions of this Court attach even more importance to the Regulations promulgated by the Commissioner; and tend to minimize the distinction be-

tween interpretative regulations and administrative ones.

Helvering vs. Reynolds, 313 U. S. 428.

Petitioner's Brief (p. 49) calls attention to the fact that some of these statements have been omitted or altered in phraseology in the new Treasury Regulations No. 105 (from which he prints in his appendix, p. 59-61, Sect. 81.3 and 81.24 as being the present Regulations applicable). These new Regulations, we are informed by the Solicitor General, were promulgated as recently as February 18, 1942 and were expected to be published on February 25th; but at this writing copies are not yet available. In so far however as they make any change in the provisions which have uniformly appeared in the Regulations since 1926 and 1937 and to which we have referred, such changes must have been made because of the pendency of the present case.

By the Act of 1932, Section 803, Congress amended Subsection 302(f) so as to include certain cases which were thought not to be covered by the existing text, which amendment would have been unnecessary if powers of appointment had been considered to be included in Section 302(a), whether exercised or not. Other parts of Section 302 have been from time to time amended, including the introductory paragraph preceding Subsection 302(a) (Act of 1934, Section 404), leaving the phraseology now in question unaltered.

That contemporaneous and long established practice and usage under a statute is of great force in determining its meaning, is a proposition sustained by decisions of practically all the courts, and a great number of cases to that effect are collected in 59 *Corp. Jur.* "*Statutes*," Section 607 and 608, pp. 1022, etc.

Or as stated by this Court in a case involving the interpretation of the bankruptcy law:

> "Only compelling language in the statute itself would warrant a rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance."
>
> *Maynard vs. Elliott*, 283 U. S. 273, 277 (1931);
>
> *Cf. Dismuke vs. U. S.*, 297 U. S. 167, 174 (1936).

Many earlier decisions of this Court to the same effect are digested and cited in U. S. Supreme Court Digest, 1929, Vol. 8, "Statutes," Sections 151, 152, 155, etc.

The administrative construction followed by the Commissioner and adopted or indicated in his Regulations, has also a peculiar force in the case of Federal Tax Statutes reenacted after such executive construction by the Commissioner or officers charged with its execution. We will not undertake to cite the great number of cases dealing with this question (most of them are collected in 1 Paul and Mertens, Law of Federal Income Taxation at Section 3.19). Recent cases in which this rule has been applied include:

Helvering vs. Reynolds Co., 306 U. S. 110, 116;

Morgan vs. Comm'r, 309 U. S. 78, 81;

Helvering vs. Oregon Mut. Life Ins. Co., 311 U. S. 267, 270;

Lang vs. Comm'r, 304 U. S. 264, 268.

3. That any such contention is foreclosed by the decisions of this Court in United States vs. Field, 255 U. S. 257; Porter vs. Comm'r., 288 U. S. 436, and other cases. A power of testamentary appointment is not an estate or interest in the property subject to such power.

The *Field* case involved the question whether property passing by the exercise of such a power was included within the scope of Subsection (a), which at that time had not been amended by the omission of the qualifying words which were omitted in the Act of 1926. It was held that (p. 262, italics supplied):

> "The conditions expressed in clause (a) are to the effect that the *taxable estate* must be (1) *an interest of the decedent at the time of his death*, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause."

Subsection (1) of the above analysis it should be noted was the one requiring the existence of an interest of the decedent at the time of his death, a requirement which still exists notwithstanding the omission of those which are numbered at (2) and (3) in the above quotation.

The Court then proceeds to hold upon authorities cited that "the existence of the power does not of itself vest any estate in the donee" (p. 263), evidently mean-

ing that the first requirement of the section (which has not been repealed) was not gratified. It concludes (p. 264): "It follows that the interest in question, not having been property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a)."

The decision was therefore clearly based upon the ground that Mrs. Field (who incidentally was the equitable life beneficiary) did not have an estate or interest in the property at the time of her death, and also upon the ground that the other then existing requirements of Subsection (a) were not complied with.

U. S. vs. Field, 255 U. S. 257.

The argument that, because the case might have been decided upon the other ground alone, that therefore what the Court decided with respect to the nature of Mrs. Field's interest was pure dictum, assumes that when a Court decides a case upon two or more grounds, its conclusions are dicta because the case might have been decided upon one of the grounds alone. This would destroy the authority of such cases for any of the propositions decided; because if it were urged as a precedent for the other ground or grounds upon which it was based, it could equally be said that its decision as to such other grounds was not a precedent, but merely dictum, because the case might have been decided upon the first ground alone.

Such a view of the authority of precedent, and of the principles of *stare decisis*, is directly contrary to well settled authority, according to which, when there are two or more grounds upon which an appellate court may rest its decision, if it adopts both, the ruling

on neither is obiter and each is the judgment of the Court and of equal validity with the other.

Railroad Companies vs. Schutte, 103 U. S. 118, 143;
Union Pac. Co. vs. Mason City Co., 199 U. S. 160, 166;
U. S. vs. Title Ins. Co., 265 U. S. 472, 486.

The *Porter* case in one respect at least is even more in point than the *Field* case; because it arose under the Revenue Act of 1926; that is to say, after Subsection (a) had been reduced to its present form. It was a case involving Section 302(d) of the Act of 1926 relating to transfers in trust with reservation of a right to change the beneficiary; and it was argued that Subsection (d) was limited by the provisions of Subsection (a), so that the amount taxable under (d) was only the interest therein of the decedent at the time of his death. In answering this contention this Court said (p. 442, italics supplied) that Subdivision (a) does not in any way refer to or purport to modify (d), and in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers, it cannot be said that if it stood alone Subsection (a) *would extend to the transfers brought into the gross estate by* (d), citing the *Field* case as authority, and further pointing out the fact that Congress has progressively expanded the bases for taxation under the Act, and that comparison of the section with corresponding provisions of earlier Acts warrants the conclusion that (d) is not a mere specification of something covered by (a), *but that it covers something not included therein.*

Porter vs. Comm'r., 288 U. S. 436 (1933).

In his present brief Petitioner (p. 42, note 25) argues that the *Porter* case amounts to no more than dictum, and further suggests that particular doubt is thrown upon such dictum by the subsequent decision in the *Sanford* case. So far however from overruling or questioning any of the argument or decision in the *Porter* case that case is cited with approval at p. 43 of the opinion in the *Sanford* case, and with respect to abandoning its rulings in the *Porter* case it was said at p. 46 (italics supplied):

> "The Government does not suggest • • • that we should depart from our earlier rulings" (in the *Porter* and other cases) "and we think it clear that we should not do so • • • *because we are satisfied with the reasoning upon which they rest.*"
>
> *Sanford Est. vs. Comm'r.*, 308 U. S. 39, 46.

Again in *Wachovia Bank vs. Doughton*, 272 U. S. 567, in which the Court held that the North Carolina statute taxing general powers of testamentary appointment could not constitutionally apply to a power of appointment over property which had been settled and was held in trust in another State, this Court says in its opinion by Justice Brandeis (p. 575), citing the *Field* case, that "personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power."

And in *Crooks vs. Harrelson*, 282 U. S. 55, the opinion points out (pp. 58-59) that it was held in the *Field* case that the property in question was not taxable "because it was not her property at the time of her death," etc.

And again in *Burnet vs. Guggenheim*, 288 U. S. 280 (holding that a gift became complete when power of

revocation was surrendered), in the opinion by Justice Cardozo (p. 288), it is said that the *Field* case holds that under the revenue act involved the subject of a power created by another is not a part of the estate of the decedent to whom the power is committed. And on pp. 284-5, that the question was not one of legislative power, but of legislative interpretation.

The finding in the *Field* case that a general power of appointment does not vest an estate or interest in the donee under the terms of Subsection (a) has been cited and followed in numerous cases in the different Circuits (collected in Shepard's Notes) as, for instance, in the Fourth Circuit in the case of *Leser vs. Burnett*, 46 F. 2d 756, where it is said (p. 759), citing the *Field* case, that "whether the power be general or special it is well settled that the existence of the power does not of itself vest an estate in the donee, and that upon its exercise the appointee takes under the donor."

We submit also that the decisions in *Helvering v. Grinnell, Morgan vs. Comm'r.*, and the other decisions to which we have referred on p. 10 of this brief as showing the entire novelty of the present claim, are also authorities in support of the proposition that Subsection (a) as amended by the Act of 1926, does not include powers of testamentary appointment, even when coupled with a life or other interest, as "interests" of the decedent. They at least show that the Court assumed that they were not included; and are, we submit, of force as precedents on the question which we are discussing under this subheading, as necessarily assuming that the cases decided were not within Subsection (a).

4. That the tax imposed by the law in question is primarily an estate tax (on the estates of decedents), and that the "interest" of decedent referred to in Subsection (a) means an interest in property owned by the decedent such as would normally constitute part of a decedent's estate.

The word "estate" has different meanings, but when employed to mean the estate of a decedent it has a quite definite meaning and application (Century Dictionary, "particularly the property left at a man's death, as at his death his estate was of the value of half a million").

To include as part of a decedent's "estate" an interest in property which in the words of this Court in *May vs. Heiner*, 281 U. S. 238, 443 "is obliterated by that event" (*i. e.*, the death of the decedent whose estate is being taxed) would require very plain and unmistakable language to evidence such an intention.

And as further said in the opinion in the same case, quoting from *Reinecke v. Northern Trust Co.*, 278 U. S. 339:

> "In the light of the general purpose of the statute and the language of Sect. 401 explicitly imposing the tax on *net estates of decedents*" (italics ours) "we think it is at least doubtful whether the trusts or interests intended to be reached by this phrase 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Sect. 401. That doubt must be resolved in favor of the taxpayer."
>
> *May vs. Heiner*, 281 U. S. 238, 244.

> "In the absence of a clear declaration it cannot be assumed that Congress intended insurance bought and paid for with the funds of another than the insured and not payable to the latter's estate, should be reckoned as part of such estate for purposes of taxation."
>
> *Lang vs. Comm'r*, 304 U. S. 264, 270.

Accordingly it has been repeatedly held that the estate tax is a "tax on the act of the testator not on the receipt of property by the legatees" (*Ithaca Trust Co. vs. United States*, 279 U. S. 151, 155; *Cf. Y. M. C. A. vs. Davis*, 264 U. S. 47, 50; *Edwards vs. Slocum*, 264 U. S. 61, 62).

It is true that by adding special sections, for the most part dealing with what may be considered as methods of avoiding or evading the incidence of estate tax, some transfers which would not ordinarily be considered as transfers of property constituting part of a decedent's estate have been brought within the scope of the statute. But as pointed out by Judge Parker in his opinion below (R. pp. 48, 49) (quoting from the opinion of Judge Patterson in *Davis vs. U. S.*, 27 F. Supp. 698) these additions were made for the most part to meet decisions which had refused to extend the general language of the estate tax law to cover transfers which were not of property owned by a decedent and passing by will or intestacy. And, as we have already seen (*ante*, p. 12), this was the construction adopted by the Commissioner, especially in Article 2 of his regulations as expressed in the revision of 1937.

No case has been found or cited in which it has ever been heretofore decided that Section 302(a) extends to any rights of a decedent which would not normally constitute part of a decedent's "estate".

5. That general expressions in the opinions of this Court, dealing with matters not related to the present question of statutory construction, are not to be taken as applicable to the construction of the statute now in question.

The numerous cases cited by Petitioner as authority for his propositions as to substantial identity of powers of appointment with ownership; as to non-exercise of powers as being as much in the nature of a testamentary disposition as the exercise thereof; that the controlling tax event for purposes of the estate tax is shift of economic benefits due to the death of the decedent; are cited, for the most part, without discrimination or any indication of what the actual nature of the decision in the cases cited was; and are from cases in which this Court was dealing with the constitutional power to tax, or with the scope and meaning of other sections of the Act expressly making taxable transfers in which substantial control and power of disposition was retained by the Settlor, the taxability of gifts when similar control was reserved, and similar questions. Petitioner's counsel apparently consider that there is no substantial difference between the two questions of what Congress and the States may constitutionally tax and what the Revenue Act in question does undertake to tax; or the arguments and considerations which are appropriate in considering these two very different questions.

That "shift of economic benefits" may be a good test in passing upon the constitutionality of an attempted tax, does not lead to the converse principle that Congress has undertaken to tax all shifts of economic benefits; and as pointed out by Judge Parker (R. p. 50-51) any such contention leads to the impossible result that

property held upon a life-estate with remainder over is subject to tax under the present law when the life tenant dies. In fact it is difficult to see why much of the argument in Petitioner's brief is not applicable to the simple case of a life interest with remainder over—it would certainly include the common case of a life interest plus a power of testamentary disposition by the life beneficiary, even if it does not include all cases where the decedent had a general power of appointment by will.

This Court has frequently condemned the attempt to apply general expressions used in opinions apart from the connection in which they were used. A number of such cases will be found in *4 Sup. Ct. Digest* (1928), "Courts", Sect. 767. Or to quote from a more recent case:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" (quoting from the opinion by Chief Justice Marshall in the Marbury case).

Humphrey's Executor vs. U. S., 295 U. S. 602, 627.

And again, in a recent case the opinion refers in this connection to "the oft-repeated admonition of Chief Justice Marshall, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."

Wright vs. U. S., 302 U. S. 583, 593.

In so practical a matter as that of the Revenue Laws, an attempt to build up a system of taxation from general expressions in opinions of this Court, dealing with more or less unrelated matters, might well be

called a highly idealistic method, rather than a realistic one.

The statement that for purposes of taxation a general power of appointment has hitherto been regarded by this Court as equivalent to ownership of the property subject to the power or that the power of disposition is the equivalent of ownership, was made in cases in which the Court was dealing with the question of the constitutional right of States to tax, under statutes expressly so providing, the transfer by death of property settled in trust by the decedent; in the first case, with powers of control over the Trustee and an exercised power of testamentary disposition, and in the second case with full power of revocation, &c. Such general statements it is submitted do not apply and could never have been intended to apply to the question whether the present Revenue Law does tax property passing in default of the exercise of a general testamentary power.

Curry vs. McCanless, 307 U. S. 357, 371;
Graves vs. Elliott, 307 U. S. 383, 386.

And the similar general statement in the Chase National Bank and Bullen cases that "to make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes" and that "the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death", are similarly taken from cases in which the constitutional question of the right to tax was the question involved and decided. In the Chase National Bank case such question was the constitutional one whether Section 401 of the Act of 1921 could validly tax, as it expressly undertook

to do, insurance in excess of $40,000 taken out and carried by the decedent with the power reserved and exercisable up to his death to change the beneficiary; while in the Bullen case the question was whether the State of Wisconsin could constitutionally tax as part of a decedent's estate property which he had settled in trust reserving complete control and power of disposition in his lifetime.

Chase National Bank vs. U. S., 278 U. S. 327, 338;
Bullen vs. Wisconsin, 240 U. S. 625, 630.

We will here relegate to a footnote[1] a brief statement of the nature of the other cases cited by Petitioner

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[1] We are taking these cases up in the order in which they are cited on pages 21-22 and 31-33 of Petitioner's brief; but only some of them contain general statements of the character relied upon by Petitioner and the relevancy of most of them, especially those cited with a "See also", is not apparent.

Helvering vs. Horst, 311 U. S. 112, was an income tax case under Section 22. The owner of bonds had detached from the bonds the coupons which would shortly mature and gave them to his son who collected them. It was held that this amounted to a realization of income by the owner of the bonds and that the dominant purpose of the income tax laws is the taxation of income to those who earn or otherwise created it and who enjoy the benefit of it when paid.

Harrison vs. Schaffner, 312 U. S. 579, was a similar case in which the life beneficiary of a trust had assigned to her children certain specified amounts in dollars to be paid out of the income of the trust for the year following the assignment.

Sanford Estate vs. Comm'r., 308 U. S. 39, was a gift tax case in which the principle was applied that a revocable gift only became final when the power of revocation was surrendered.

Burnet vs. Guggenheim, 288 U. S. 280, was also a gift tax case in which the same principle was applied.

in support of his general propositions, as we wish to give special attention to the *Clifford* case, on which Petitioner principally relies. It involved the scope of Section 22(a) in the income tax law, which is very different in its terms and provisions from the subsection in the estate tax law now under consideration.

Helvering vs. Hallock, 309 U. S. 106, involved the construction and application of sub-section (c) of the Estate Tax Law, providing for the taxation of transfers made by the decedent in his lifetime and intended to take effect in possession and enjoyment at or after his death.

Chase Nat'l Bank vs. U. S., 278 U. S. 327, involved the constitutional question whether Section 401 of the Act of 1921 could validly tax (as it expressly provided) insurance in excess of $40,000 taken out and carried by decedent with the power reserved and exercisable up to his death to change the beneficiaries.

Reinecke vs. Northern Trust Co., 278 U. S. 339, involved the constitutionality and construction of sub-section (c) of the Estate Tax Law, and held that trusts which the decedent had created with full power of revocation reserved during his lifetime, were intended to take effect in possession or enjoyment at or after his death.

Tyler vs. U. S., 281 U. S. 497, held that Congress could tax (as it had expressly done) the passage of the interest of one spouse in property held in entireties, on death to the survivor; and *U. S. vs. Jacobs*, 306 U. S. 363, similarly sustained the constitutionality of the similar provision as to property held in joint tenancy.

Klein vs. U. S., 283 U. S. 231, held that the Estate Tax Law was constitutionally applicable to a contingent remainder which had become a vested remainder by the death of the grantor.

Phillips vs. Dime Trust Co., 284 U. S. 160, upheld the constitutionality of the Section specially including as a subject of estate tax property held by entireties.

Guiney vs. Comm'r., 287 U. S. 224, involved the similar question of the constitutionality of taxing interests in joint tenancy, as the statute expressly provided.

Porter vs. Comm'r., 288 U. S. 436, is the case which we have discussed under Point 3 of this brief.

In that case a husband had executed a declaration of trust with respect to certain securities owned by him, creating a trust to continue for the term of five years, during which he was to pay to his wife the income as it accrued; but he retained in himself the right to accumulate income (which would revert to him

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Third Nat. Bank vs. White, 287 U. S. 577, is a *per curiam* decision sustaining the taxability of property held in entireties.

Helvering vs. Bowers, 303 U. S. 618, and *Foster vs. Comm'r.*, 303 U. S. 618, are similar *per curiam* decisions following the Tyler case (*supra*) as to property held in entireties.

U. S. vs. Jacobs, 306 U. S. 363, upheld the constitutionality of the statute expressly taxing interests held in joint tenancy.

Saltonstall vs. Saltonstall, 276 U. S. 260, was whether the State of Massachusetts could constitutionally tax (by express provision) property passing under a trust settlement made by decedent with full power to revoke or alter, with the consent of one trustee, during his lifetime.

Graves vs. Elliott, 307 U. S. 383, involved the constitutional question whether the State of New York could (as it expressly did) impose transfer tax upon the relinquishment of a power of revocation.

Helvering vs. Hutchins, 312 U. S. 393, was a gift tax case involving the amount of exemption to which the donor was entitled when he had made a deed of trust for the benefit of numerous beneficiaries.

Corliss vs. Bowers, 281 U. S. 376, held that under the express provisions of the Revenue Act of 1924 income from a revocable trust was taxable to the donor.

Curry vs. McCanless, 307 U. S. 357, (like the companion case of *Graves vs. Elliott* above cited) dealt with the question of the constitutional right of a State to tax, under a statute expressly so providing, the transfer at death of property settled in trust by the decedent with full powers of control.

Bullen vs. Wisconsin, 240 U. S. 625, involved the question whether the State of Wisconsin could constitutionally tax

at the end of the five-year period) and with insignificant exceptions the complete control over the principal as to conversion, investment, reinvestment, etc. It was held that such retained rights in the property might properly be found by the taxing authorites to make him the owner of the fund, within the intent of Section 22(a), so that the income so paid to his wife was taxable to him as part of his own income.

(as the statute expressly did) the succession to property which the decedent had settled in trust reserving complete control and power of disposition in his lifetime.

Chanler vs. Kelsey, 205 U. S. 466, held that a New York statute taxing property passing by the exercise of a power of appointment was constitutional.

Comm'r. vs. Prouty, 115 F. 2d 331 (1st Circ.), involved the question of what was a "substantial adverse interest" under the express provisions in the income tax law as to reservations of powers to revoke and amend.

Richardson vs. Comm'r., 121 F. 2d 1 (2d Circ.), is cited in our text.

Brown vs. Comm'r., 119 F. 2d 983 (7th Circ.), involved the construction of sub-section 1d) of the Estate Tax Law, making taxable property which the decedent had transferred in trust, etc., with a reserved power of change or revocation.

Comm'r. vs. Solomon, 124 F. 2d 86 (3rd Circ.), was a gift tax case holding that a revocable gift only becomes complete when power of revocation is surrendered.

U. S. vs. Robins, 269 U. S. 315, held that under the law of community property as recognized in California the income from such property is taxable to the husband and not to the wife.

Cohen vs. Samuels, 245 U. S. 50, held that a policy of insurance which had a cash surrender value passed to the trustee in bankruptcy under the provision in the bankruptcy law clothing the Trustee with all powers which the bankrupt might have exercised for his own benefit. (Manifestly a testamentary power could not so pass or be exercised by a Trustee.)

Whether this decision would apply to and include a similar trust, created by a third party, for the benefit of the husband and his wife, is a question which has not been passed upon by this Court. The fact that he was himself the creator of the trust is stressed in the opinion; and the *Richardson* case (*Richardson vs. Comm'r*, 121 F. 2d 1, decided by the Circuit Court of Appeals of the First Circuit and in which certiorari was denied by this Court), which is relied upon as showing that it is immaterial, was a case in which the property in question had been assigned by the husband to his wife one year before they joined in creating the trusts, under which it was held that the income from the trusts was substantially the income of the husband.

However that is a question the decision of which is not necessary in the present case, and which we may well concede for the sake of argument, since the language of Section 22(a) of the income tax law and that of Section 302(a) of the estate tax law (involved in this case) are so different and the history and background of the two provisions are so unlike, that the argument and principles relied upon in the *Clifford* case, are inapplicable to the interpretation of "interest" in Section 302(a).

The broad language of Section 22(a) included among "gross income" all "gains, profits and income derived from professions, vocations, trades, businesses, commerce, or sales, or dealings in property * * * growing out of the ownership, or use of, or interest in, such property; also from interest, rents, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." (It is to be noted that

the concluding clause had what is sometimes called the vice of including the term to be defined in the definition; and included generally whatever might be called income.) It was in reference to these all-inclusive words that the Court said "that the broad sweep of the language indicated the purpose of Congress to use the full measure of its taxing power within the definable categories" (p. 334); and that "technical considerations and niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes, should not obscure the basic issue." In the present case the question is whether powers of appointment come within the category of "interests" at all; and it cannot be said that the reference to "niceties of the law of trusts", etc., carries with it the implication that the distinction between interests and powers is an outworn legalistic conception, even in tax cases. It was not so considered in the *Field* case and other cases which we have cited under Point 3, *ante;* nor can Congress have had any such result in view, since throughout the history of the estate tax law it has consistently observed such a distinction by providing specially (as in Subsection f) for powers of appointment, and for other cases, which certainly indicates no disregard of such legal distinctions.

Helvering vs. Clifford, 309 U. S. 331.

It is worth noting in this connection that in the companion case of *Helvering vs. Wood,* similar in its facts to the *Clifford* case, but in which the Government did not invoke the provisions of Section 22(a) but had expressly waived reliance on any other section than the narrow provisions of Section 166 (which it was held

were not applicable), and in which it was argued that "in economic fact" the power to revoke is the equivalent of a reversion, this argument was answered in the opinion (which was delivered by the same Justice as in the *Clifford* case) by saying that "at least in the law of estates they are by no means synonymous"; and that whether as a matter of policy such distinctions should be perpetuated in the tax law by selecting one type of trust but not the other for special treatment, "is not for us."

Helvering vs. Wood, 309 U. S. 344, 347.

As we have said the question with respect to Section 302(a) is whether powers of appointment are included in the general category at all, and while the broad language as well as the numerous enumerations of Section 22(a) may have indicated the purpose of Congress to use the full measure of its taxing power, within the categories mentioned (which included, as we have seen, "all income derived from any source whatever"), to hold that the word "interest" is a category of equal breadth and scope would involve the supposition that tax laws are to be construed on the theory that all possible taxes which might constitutionally be levied, are to be considered as having been imposed; which is of course contrary to the well settled principle that the provisions of taxing statutes are not to be extended by implication and that doubts must be resolved in favor of the taxpayer.

United States vs. Field, 255 U. S. 257, 262;
Reinecke vs. Northern Trust Co., 278 U. S. 339, 348-9.

It is not necessary to cite the numerous other decisions of this Court enunciating and applying this well known rule.

The general authorities cited in Petitioner's brief (p. 32, &c.) as supporting his claim of substantial equivalence of powers of appointment and ownership, do not give any support to such a contention. The statement that "even at common law a life estate plus a general testamentary power was considered almost the equivalent of fee ownership" which is supported by a reference to *Sugden on Powers*, is entirely unsupported by the reference. The discussion in Sugden's work referred to begins with the following statement by the author (see p. 177 in the edition referred to):

> "It will here be proper to consider what is a *power*, and not an *interest*"

and is followed by the statement (p. 178):

> "A devise to A for life, expressly with remainder to such persons as he shall by deed or will, or otherwise, appoint, will of course not give him the absolute interest, although he may acquire it by the exercise of his power, and the rule applies to personal estate as well as real estate."

This is followed by a discussion of cases where the devise was not expressly for life but indefinitely, followed by language which might be taken as either describing the devisee's interest or as possibly creating a power. (It should be remembered in this connection that in Sugden's time words of perpetuity were required to give more than a life estate.)

The author concludes the discussion (p. 183) by saying, however, that "wherever a power is clearly intended to be given, the devisee cannot be holden to take a fee."

Sugden on Powers, 1856 Am. Edit., Vol. 1, pages above noted.

The citation from Mr. Glenn's work on fraudulent conveyances merely shows that Mr. Glenn strongly approves of the statutes which have been adopted in some States subjecting to liability for debts of a decedent property covered by a general power of appointment though not exercised (*Glenn on. Fraudulent Conveyances*, Section 159-160); and the New York statute referred to by Petitioner is a statute of this character which, however, saves all future estates limited in case the power of absolute disposition is not exercised, and the property is not sold for the satisfaction of the decedent's debts (*New York Real Property Law*, Section 149).

But what application have these citations to the present question, especially as this Court found in *United States vs. Field, supra*, that the existing common law was not such.

North Carolina has no such statute, and it was long ago decided, in that State, that the rule as to the liability of property subject to power of appointment for the donee's debts, was the same as that assumed in the *Field* case, viz, that if the power were exercised, the property could be subjected in equity to the payment of the donee's debts; but if not exercised, it could not be reached by creditors.

Harrison vs. Battle (1835), 21 N. C. (1 Dev. & B. Eq.) 213;

Rogers vs. Hinton (1867), 62 N. C. (Phillips Eq.) 101; S. C. 63 N. C. 78.

That the distinction between property and powers of appointment is fully recognized in the North Carolina law is clearly shown by the following quotations from the *Battle* case just cited and a later case, in both

of which the donee had a life estate with general power of appointment.

> "There is a marked distinction between property and power. The estate devised to Mrs. Chewning is property, the power of disposal a mere authority which she could exercise or not at her discretion."
>
> *Chewning vs. Mason*, 158 N. C. 578.

> "The simple power which Frances Cooper had was no estate in the trust."
>
> *Harrison vs. Battle*, 21 N. C. 214.

The argument that a donee of a general testamentary power has an "interest" because he may be held liable in damages for breach of a contract to execute such a power in a certain way, although admittedly such contracts cannot be specifically enforced (p. 30), proves nothing. A man may obligate himself so as to be liable in damages, to do anything, unless the contract is for some reason illegal or contrary to public policy. Thus he may be held liable under a general warranty of title, though, and for the reason that, he had no title to the property as to which such warranty was made. This does not amount to his having any rights or interest in the property warranted. An insurance company may insure a vessel already lost at sea, if the contract so provides.

Incidentally, the Harvard Law Review note (*51 Harv. L. Rev.* 1451) referred to is a note appended to an Illinois case holding that damages could *not* be recovered for the breach of a contract to appoint under a general testamentary power, and says that the case is the only decision on this point found in the

United States. But whether or not the breach of such a contract justifies a suit against the contractor (who may be insolvent) or a claim against his estate, it is perfectly clear that it gives no rights against the property itself, or against whoever may take it as the result of non-exercise of the power (except under a statute like the New York one referred to).

And if it be true that a general testamentary power may be released by the donee for a consideration (a question on which there has been considerable conflict of authority), such release may be made only to the parties taking in default of exercise of the power, and does not give the donee of the power any rights equivalent to those of an owner, to dispose of the property during his lifetime.

6. That the fact that Congress by the Revenue Act of 1926, in making the change in the wording of Section 302(a) which is relied on as having effected the hitherto unsuspected result now contended for, reenacted unchanged and without explanation the provisions of Section 302(f), taxing the exercise of a power of testamentary appointment, does indicate clearly that no such result as is now contended for was intended or contemplated.

We do not contend that there is any arbitrary rule that the provisions of successive sections in statutes must not overlap, or that it is not infrequently the case that different provisions do to a greater or less extent overlap, so that a particular state of facts may bring a case within more than one section or provision of a statute.

The question is after all one of legislative intent, and goes only to what light is thrown on the legislative intent by such double provisions. If the intent of one

section be entirely clear, and free from any ambiguity (as we submit is the case with reference to Section 302a) then of course there is no occasion for resorting to such considerations. But if a real question exists as to the scope of one section (and counsel for Petitioner will hardly have the assurance to contend that the meaning sought to be attributed to it after fifteen years of universal belief to the contrary is so clear as to be subject to no doubt), then the fact that Congress reenacted in the Act of 1926 (and subsequently again reenacted) a section made not only unnecessary but positively misleading (so misleading that it has misled everybody for fifteen years) by the broader scope which it is now claimed was given to Section 302(a), is certainly of great importance in determining whether Congress intended the result now claimed. As said in *U. S. vs. Field*, 255 U. S. 257, 264-5, "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed." And the insertion of the clause expressly taxing such property "indicates that Congress at least was doubtful whether the previous Act included property passing by appointment." Or as said by Judge Parker in the opinion of the C. C. A. in the present case (R. p. 49):

> "We recognize of course that the specific provisions following Subsection (a) are not necessarily inconsistent with an intention to give to that subsection a scope broad enough to cover the matters covered by these specific provisions" (citing the *Clifford* case), "but it is hardly thinkable that Congress would have passed Subsection (f) to cover property passing under the exercise of a general power of appointment if property subject

to such power, whether exercised or not, was already embraced by Subsection (a)."

The cases summarized in Petitioner's brief on pages 40-41 are not, for the most part appropriate as establishing the proposition that there is no arbitrary rule that different provisions in the statute must not, or should not, overlap; a proposition which we have not disputed. We are stating the substance of these cases in a footnote.[2]

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[2] In *Reinecke vs. Northern Trust Co.*, 278 U. S. 339 (1929) the settlor died in 1922 and the Revenue Act of 1921 was the statute involved. There is no mention of Section 302(d) of the subsequent Act of 1924 (which Petitioner says specifically covered the particular case presented), anywhere in the report of the case nor was the Court's attention in any way directed to it as having any bearing or application. Being an Act passed subsequent to the date as of which tax liability accrued, it could hardly have had much effect on the decision if it had been brought to the attention of the Court.

Burnet vs. Guggenheim, 288 U. S. 280 (1933), was a gift tax case, and the law applicable Sections 319 and 320 of the gift tax law of 1924. The gift in question had become final by surrender in 1925 of the power of revocation originally reserved, for which year gift tax was accordingly claimed. The Act of 1932 which Petitioner says contained a provision which the decision rendered superfluous, was passed seven years after the basic date, and after the decision of this case by the C. C. A., and the only reference to it in the Court's opinion is on p. 283, where the opinion says that it "will give the rule for later transfers."

Sanford Est. vs. Comm'r., 308 U. S. 39 (1939) was also a gift tax case. The date of incidence of gift tax, it was decided, was 1924, when power of revocation was finally surrendered, and the law applicable was the Act of 1924. The opinion merely refers to the Act of 1932 (passed eight years after the basic date) as having made the donee also liable for gift tax, from which it argues (as showing that gift tax does not accrue when a revocable gift is made) that

All that was said on the purpose or scope of the proposed change in the report of the Committee on Ways

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Congress cannot be supposed to have intended to impose such liability on a donee of so incomplete a gift that it might be taken from him by revocation on the next day. And on p. 45 in a footnote the Act of 1932 is merely referred to as having added a new provision to the gift tax law, which was repealed in 1934 because the decision in *Burnet vs. Guggenheim* made it unnecessary.

Higgins vs. Smith, 308 U. S. 473, merely held that the provision in the Revenue Act of 1934 providing that losses on sales to corporations controlled by the taxpayer are not deductible, did not necessarily show that the preexisting law (under which the case arose) was otherwise.

Douglas vs. Willcuts, 296 U. S. 1, 10, says that the particular provisions in the statutes defining instances in which the grantor remains taxable, as in case of certain reservations for his benefit, etc., are not to be regarded as excluding instances not specified where in contemplation of law the income remains in substance that of the grantor.

Helvering vs. Minnesota Tea Co., 296 U. S. 378, 384, held that if one of two clauses did "somewhat overlap the other" (referring to the provisions relating to reorganizations under the income tax law) "the taxpayer should not be denied for that reason what one paragraph clearly granted him."

McCauley vs. Comm'r., 44 F. 2d 919, was a case arising under the Revenue Law of 1921. The specific provision referred to was enacted in the law of 1924 (subsequent to the basic date), which the Court thought from its history was merely declaratory of the preexisting law.

O'Donnell vs. Comm'r., 64 F. 2d 634, was similar to the case last cited, in that it held that while a section in a later act was not expressly made retroactive, it was generally considered to be a declaration and clarification of existing law, and not a change of legislative intent.

Helvering vs. Clifford, 309 U. S. 331, does support the general proposition (which as above said we have not disputed) that a special provision for one particular class of cases does not necessarily exclude such cases from the purview of a broader section. We have discussed this case more particularly in its bearing on the questions involved in this case, under the previous heading of this brief.

and Means while the Act of 1926 was pending in Congress, is as follows (R. p. 45):

> "Under existing law the gross estate is determined by including the interest of the decedent at the time of his death in all classes of property which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. In the interest of certainty it is recommended that the limiting language above referred to shall be eliminated in the proposed bill, so that the gross estate shall include the entire interest of the decedent at the time of his death in all the property."

House Reports, Vol. 1, 69th Congress, 1st Sess. 1925-6, at p. 15;
Cf. Senate Reports, do, at p. 7, etc.

This also would seem to negative any intent to introduce so radical a change in the statute, as it is now contended was meant. If the amendment in Section 302(a) made by the proposed statute (Act of 1926) was intended to have the effect now claimed, it might have been better said that the change was proposed "in the interest of uncertainty" (Point 8, *post*).

7. That the decedent (Zachary Smith Reynolds) did not have rights under any of the three trusts involved which can be said to be substantially equivalent to ownership.

In Petitioner's brief (p. 26, etc.) these rights are classified as being (A) lifetime enjoyment of the property to the exclusion of all others; (B) an unlimited power to dispose of the property by will to whomsoever he chooses; and (C) the assurance that if he fails

to dispose of the property by will it will pass to members of his immediate family. We shall therefore discuss the nature of the rights which he had at the time of his death under four headings; viz, his rights in the income, his rights in the corpus (other than his power of testamentary disposition), his power of testamentary disposition, and, lastly what Petitioner calls the assurance that the property would pass in the absence of appointment to the members of his immediate family.

His rights with respect to the income of the trusts.

These rights were extremely limited, and at the time of his death were not even equivalent to an equitable life interest in the income from the three trusts.

An equitable life estate implies at least the right to receive the income from the trust or have it applied to one's use and benefit.

Under the will of his father (R. p. 59) it was left to the discretion of his mother, during his minority, how much of the income, if any, should be paid to *her* for his support, maintenance and education; and after attaining the age of twenty-one and until twenty-eight the Trustee was directed to pay him only five thousand dollars a year, unless in the opinion of his mother, if she were living, that amount should be inadequate; but in no event was such total annual allowance to exceed fifty thousand dollars (a small fraction of the total income from the property in question). Any surplus income was directed to be accumulated until he should attain twenty-eight and such accumulations were to become an addition to corpus, which he would receive only in the event that he survived until he was twenty-eight. He was not therefore the only person

interested in the income; but those who would take under the will in the event of non-exercise of his power of testamentary appointment; viz, his issue, his brother and sisters, under the limitation over in trust for them, etc., had distinct rights in the greater part of the income which was necessarily accumulated.

Under the will of his mother (R. p. 69), until he attained twenty-one the amount to be applied for his support and education was similarly restricted, and after attaining twenty-one and until twenty-eight the entire income was to be accumulated and added to corpus, subject only to a discretion given the Trustee to apply part of it for his benefit if deemed necessary. Not until after he attained twenty-eight was he to receive the entire net income from the accumulated assets of the trust.

Under Mrs. Johnston's deed of trust (R. p. 74) until he should attain twenty-eight the entire income was to be accumulated and added to corpus.

In all three cases therefore his rights in the income (except for a relatively small allowance in the first two cases and none in the third) were future and contingent.

His Rights with Respect to the Corpus (other than His Testamentary Power).

Under his father's will, if he survived to attain the age of twenty-eight, he would have then become entitled to receive the corpus and accumulated income of the trust. Under the will and deed of trust of his mother he would never have succeeded to more than an equitable life estate in the income from the accumulated trusts, even after he attained the age of twenty-eight.

The nature of this future interest (right to receive the property at the age of twenty-eight) under the R. J. Reynolds' will was the subject of elaborate consideration in a recent case, in which, after Richard J. Reynolds, the eldest of the four children of R. J. Reynolds, had attained the age of twenty-eight and received his share, the question arose as to the proper basic date for determining the cost or value of the assets so received, when he subsequently disposed of them. On one side it was claimed that the basic date for this purpose was when he attained twenty-eight. It was contended by the Commissioner (which contention was supported by the Regulations) that the death of his father was such basic date, whether the will conferred a vested estate or a purely contingent one upon him, prior to attaining twenty-eight.

The Circuit Court of Appeals for the Fourth Circuit considered fully in this case the question whether the will conferred a vested estate or a purely contingent estate (prior to attaining twenty-eight) in the corpus, and decided that the limitation to him on attaining twenty-eight was a contingent remainder.

Reynolds vs. Comm'r, 114 F. 2d 804 (Oct. 1940).

While the decision in this case was reversed on certiorari, yet the scope of review was expressly confined to the Federal question involved, excluding any review of the question whether the taxpayer took a vested estate under his father's will before attaining twenty-eight.

Helvering vs. Reynolds (grant of certiorari), 312 U. S. 672; (final opinion) 313 U. S. 428, 430.

The Superior Court for Forsyth County, North Carolina, in its judgment, affirmed by the North Carolina Supreme Court, made certain findings as to the nature of Zachary Smith Reynolds' interests in these trusts. Such findings were not dictum, but were relevant in connection with the determination of the question whether there was any basis for the claim of the State of North Carolina to inheritance tax; such claim being contested by the Trustee.[3] These findings will be found on p. 94 of the present Record and conclude with respect to the trust under his father's will that until he arrived at the age of twenty-eight years the only interest which he had in the trust estate established by said will, or any part thereof, was to receive such payments from the income thereof as might become payable to him under the terms of the will, and that consequently upon his death under twenty-one no part of said trust estate (either corpus or income) was transferred from him to anyone.

Under the will and under the deed of trust of his mother, Mrs. Johnston, there was no similar provision for paying over to him corpus at twenty-eight, or any other age. Under these two trusts, upon attaining twenty-eight he would have become entitled to receive the net income from the accumulated trust, for the rest of his life, and would never have succeeded to any other right under these two trusts than such rights in the income and his power of testamentary appointment.

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[3] As some comment has been made in the course of this case upon the fact that the State of North Carolina was allowed a large amount in compromise of its claim, we wish to call attention to the fact that the North Carolina inheritance tax law expressly includes unexercised powers of appointment. Ann. Code North Carolina, Section 7880(I) Fifth.

His Power of Testamentary Appointment.

It has not been denied that his testamentary power, in all three of the trusts, was a general power in the sense that it was not limited to be exercised only for limited purposes and for a limited class of beneficiaries. Such general powers of appointment are common, as stated by Petitioner, in innumerable other trusts covering property of incalculable value (*ante*, p. 12). That they do not constitute an interest in the property subject to such power is as we have shown clearly established.

But it is not even true, in the present case, that Zachary Smith Reynolds had at the time of his death a present power of testamentary appointment.

Petitioner argues in his brief (p. 34, Note 17) that his disability from exercising his testamentary powers "did not inhere in the powers" and was in no way different from the disability which he would have been under had he held legal title to the property held in the trust, at the time of his death; and that a change of domicile might have enabled him to exercise his power though still under twenty-one. The contrary however was found or decided by the North Carolina Courts in reference to these powers.

In the opinion of Judge Clarkson in the Cabarrus County case (as quoted in the opinion of the Board R. p. 18; *Reynolds Guardianship*, 206 N. C. 276 at p. 290), it was said that it was to be inferred that R. J. Reynolds made his will with the North Carolina law in view and that "no language gives the right of appointment under twenty-one years of age," and further that "the wills of R. J. Reynolds and Katharine S. Johnston appear to indicate an intention that Zachary Smith Reynolds could only exercise the power of ap-

pointment after he became twenty-one years of age," (evidently referring to the elaborate provisions for guardianship till then); and accordingly in the judgment in the Forsyth County case it was found that "even if Zachary Smith Reynolds had the power to adopt a domicile of choice and execute a will in the State of New York which would affect his present estate absolutely owned, such a will could not exercise the powers of appointment under the will of his father R. J. Reynolds and the will and deed of his mother Katharine S. Johnston" (R. p. 730; *Reynolds vs. Reynolds*, 208 N. C. 578 at p. 592). It was also found by the Maryland Court (R. p. 35; as quoted in Judge Parker's opinion, R. p. 51) that the attempted will "was altogether void and without effect as an exercise of any power of appointment or disposition which Zachary Smith Reynolds would have possessed or had, if he had attained lawful age at the time of his death." If therefore under North Carolina law he did not have such a power before attaining twenty-one, it would seem clear that at the time of his death he did not have a present power of testamentary appointment.

It is objected that neither in the North Carolina case nor in the Maryland case did the Judge who entered the judgment or decree file an opinion. The recitals and findings in the North Carolina case however were as full as any opinion, in determining the North Carolina law as applicable to the case before it; and both judgments or decrees were entered after full argument and in cases in which every possible person in interest had been made parties, including legatees under the attempted New York will.

Recent decisions of this Court tend to support rather than to impair the conclusiveness of determinations of

the law by State tribunals. No new principle as to the scope of Federal law and State law was introduced by the decision in the *Morgan* case (*Morgan vs. Comm'r*, 309 U. S. 78). In that case the State of Wisconsin had undertaken to define "general powers" as including only powers exercisable either by deed or by will; defining all other powers as special. It was held that while the nature of the power conferred was to be determined according to Wisconsin law, that this did not mean that the Federal Courts were bound by such a definition; but that the nature of the power in its essential attributes should be determined according to State law, and that then the question of whether it was a "general power" within the terms of the Act of Congress, was a Federal question.

In three cases decided by the Supreme Court on December 9th, 1940, it was held that the Federal Courts should follow the decisions of intermediate state appellate courts and even courts of first instance, in the absence of any final decision of the highest court of the State.

West v. Am. Teleph. Co., 311 U. S. 223;
Six Companies v. Joint Highway Dist., 311 U. S. 180;
Fidelity Union Trust Co. v. Field, 311 U. S. 169.

See especially the opinion in the *Blair* case and its discussion of the applicability and the effect to be given to a decision of the State Court (obtained after a contrary decision of the Federal Court in a case involving the taxpayer's income for the preceding year) construing the provisions of the trust involved in that case; especially in connection with the discussion in the

case in the C. C. A. below beginning with the words "We would be better satisfied if the suit in the State court had been more adversary in its nature," concluding that the case was not unlike a consent decree, yet consent decrees are binding if entered by a court of competent jurisdiction with the parties properly before it in the absence of a showing of collusion or fraud upon the Court.

Blair vs. Comm'r, 300 U. S. 5;
Comm'r vs. Blair, 83 F. 2d 655, 657;
Cf. *Sharp vs. Comm'r*, 303 U. S. 624 (*per curiam* opinion reversing *Sharp vs. Commissioner*, 91 F. 2d 802);
Freuler vs. Helvering, 291 U. S. 35.

We submit, therefore, that the findings and decisions of the State courts in the present case establish that the decedent at the time of his death did not yet have present powers of testamentary appointment; not only because of the "accidental" fact of minority, but for reasons inherent in the powers themselves, under the terms of the instruments creating them, and under North Carolina law.

The case presented is not, as Petitioner contends, analogous to that of ownership of property by an infant. In such a case it is true that the infant's incapacity to transfer would not affect the estate tax. In that case, however, the infant has a *present vested right* in the property, *which passes from him* upon his death, by devolution of law. In the present case, by reason of the condition precedent, he did not have the present power of appointment, and, upon his death, the property did not pass from him, by reason of his failure to exercise an existing power of appointment. On the

contrary, the property passed under the testator's will by reason of the fact that the decedent never acquired the power of appointment.

Certainly there is no basis in this case for any contention that the decedent made a deliberate choice not to execute the power and that, by so doing, he really passed the property on to those who took in such event. As a matter of fact, the decedent did attempt to exercise the power. His attempt was void because he had not arrived at the age at which it was intended he should have the power.

Petitioner argues in his brief (p. 34, Note 17) that the decedent's disability to exercise the powers "was no different from the disability under which he would have been had he held formal fee title in the property at the time of his death"; and further argues that it is immaterial whether the decedent had a present power of testamentary disposition or only a power which he could exercise at the time of his death under twenty-one. From the standpoint which we are now discussing this argument would seem to run somewhat like this:

(a) Decedent had a power of appointment.

(b) This power of disposition was equivalent to substantial ownership.

(c) If he had been the absolute owner he could not have disposed of it.

(d) Hence it is immaterial whether he had the power of disposition or not.

This is rather a strange argument in view of Petitioner's constant insistence upon a "practical" and "realistic" treatment of tax questions. If from a practical standpoint, "the power of disposition is the

equivalent of ownership," we submit that the absolute incapacity to exercise a power is the equivalent of no power at all.

His Assurance that the Property Would Pass in the Absence of Appointment to the Members of His Immediate Family.

As well said by Judge Parker in the opinion below (R. p. 44):

> "Nor is anything added by reason of the fact that the persons designated to take in default of appointment were the natural objects of decedent's bounty. They were the natural objects of the bounty of his father and mother also; but the question of importance is that in default of the exercise of the powers of appointment by him, they took not from him or through him, but under the wills of his father and mother and under the deed of his mother."

Nor is it to be assumed that the several classes who were to take under the trusts now in question, upon the non-exercise of the power, were necessarily those to whom the testator would have bequeathed his own outright property. He did not in fact attempt to will the property to his own children.

But we cannot see that such an "assurance" adds anything more to a decedent's rights in property, than his expectation of inheriting from his father or mother, while they were still living, would constitute an "interest" in property owned by them.

Whether therefore his rights be considered separately or collectively (as a "bundle of rights"), they fall far short of anything which by any stretch of the

words can be called substantially equivalent to ownership.[4]

8. That to hold that the scope of Section 302(a) was broadened so as to include all cases in which a court may think that the rights of decedent were substantially as beneficial as outright ownership, would put the determination of such cases in a legal fog; and that if Congress had intended any such sweeping change it would have made some provision for defining or determining what the nature of the interest in property not belonging to the decedent should be to justify its inclusion.

As we have already mentioned (*ante*, p. 40), it was stated in the report of the Committee while the Act of 1926 was pending in Congress, that the change proposed to be made was "in the interest of certainty." If the intent and purpose of the change was in any respect what is now contended for by Petitioner, then it might well be said that so far from introducing greater certainty in the law, it established a wide field of uncertainty, and left it for the courts to decide what cases of "passage of economic benefits," what

[4] Petitioner's Brief contemptuously calls all of these limitations upon the rights of the decedent, "restraints on alienation" or "spendthrift trust provisions" (pp. 14, 15, 18, 28, 32 and 36). This is a strange abuse of terminology. The will of R. J. Reynolds does contain a "spendthrift trust" provision in conventional form (Item Eighth, R. p. 63), but we have not relied upon that in support of our contentions. The holding of the Circuit Court of Appeals for the Tenth Circuit, in *Landman vs. Comm'r.*, 123 F. 2d 787, that the descent of property owned by a Creek Indian was not exempt from estate tax because of the control exercised by the Government over the property of such indians, is not here in point.

powers of appointment and what rights in property which did not constitute either ownership or an estate or interest, were to be considered as bringing cases within the scope of the section as so amended.

That Congress has never heretofore intentionally undertaken to tax the non-exercise of powers of testamentary appointment is of course well known. If it had undertaken to impose an excise tax upon such passages of title, contrary to its preexisting policy, it is inconceivable that Congress would not have included in the statute some indication or guide as to the character of rights which were to be considered as included within the section as amended; and would have thrown upon the courts the entire burden of deciding these questions. It is of course conceded that prior to the Act of 1926 Subsection (a) was strictly an estate tax provision, in that it was confined to property owned by the decedent and which normally would constitute part of his "estate" on death. If the argument of Petitioner's counsel that the leaving out of the words omitted in the reenactment of Section 302(a) by the Act of 1926 had any of the results now contended for, then Congress would have been putting upon the courts the burden of working out the principles which should apply in the ascertainment of the new field so opened for taxation, which would be a task of far greater difficulty than any resulting from the decision in the *Clifford* case with respect to the scope of Section 22(a) in the Income Tax Law.

In view of the history of Federal estate taxes, and the failure of Congress at any time to suggest the inclusion of unexercised powers of testamentary appointment as the subject of an excise tax, it is inconceivable that Congress intended to introduce so ex-

tensive and novel a field, and that if Congress had so intended, it would not have been more specific as to the boundaries of the field so added to the transfers intended to be taxable under the Act.[5]

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[5] Petitioner says (p. 24) that the construction of the statute adopted by the Court below, leaves unanswered the "critical question" of why Congress would have wanted to draw such a distinction (between powers and ownership).

We abstain from any discussion of the question whether the non-exercise of a power of appointment should be made the subject of an estate or inheritance tax, and whether it would be desirable to include as the subject of such taxation "economic shifts" due to the death of life tenants, etc.; and whether as sometimes suggested estate and succession taxes should be so framed that all estates and trusts (especially all large fortunes) would be subjected to such taxation at least once in every generation. These are, of course, questions for Congress to decide, and not for this Court; and in this connection we desire to quote the words of a very recent decision in the case of a contract between a shipbuilding company and the Government, in which apparently considerations of this character had been urged.

In the principal opinion delivered by Mr. Justice Black it is said that the profits made in the contract before the Court and other contracts entered into under the same system "may justly arouse indignation. But indignation based on the notions of morality of this or any other Court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress". (Citing a similar statement in Justice Miller in *Smoot's case*, 15 Wall. 36, 45-46). In his concurring opinion Mr. Justice Murphy says that "the question before the Court for decision, however, is not whether an arrangement like the one presented for review accords with our conception of business morality or with correct administration of the public business. * * * It is the duty and responsibility of the Courts, not to rewrite contracts according to our own views of what is practical and fair, but to enforce them in accordance with the evidence and recognized principles of law." Mr. Justice Douglas in his dissenting opinion said that on the point of duress and coercion he thoroughly agreed with the views expressed by

9. That the attempt to tax as part of a decedent's estate, the passage of title due to his death under limitations in trust settlements made before any law attempting to tax such devolutions was passed, would involve serious constitutional questions as to the validity of such an attempt, and that the existence of such questions is a sufficient reason for not assuming that any such result was intended by Congress, by the amendment of the law now invoked.

It has been repeatedly held that the existence of serious constitutional questions is a sufficient reason for construing statutes in such a manner as to avoid such doubts. Many older cases on this are collected in *1 Honnold, Supreme Court Law*, Construction of-

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Mr. Justice Black and joined in the opinion of the Court; and Mr. Justice Frankfurter in his dissenting opinion said:

> "What powers the Congress should give the President in order to obtain the most effective production of war supplies, how the President should exercise those powers, whether a system of private contracts for war materials is conducive to unjustifiable waste and profiteering, or whether government production of necessary war supplies is a wiser course,—these and other like matters are not our business and upon them we should neither express nor intimate views. However circumscribed the judicial area may be we had best remain within it."
>
> *U. S. vs. Bethlehem Steel Corporation*, decided Feb. 16, 1942; U. S. Law Week, Vol. 10, Sect. 4, pp. 4200, &c.

It is not conceivable that the question whether the non-exercise of power of appointment should be subjected to Federal tax, is a question that would arouse "moral indignation". But if any of the Justices of this Court should have strong views upon that question, we respectfully submit that such questions are for the determination of Congress, and not of this Court.

Statutes, Section 22, p. 584. Leading recent cases applying this principle to the construction of the revenue laws include the following:

> "We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick * * *. Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind."

Lewellyn vs. Frick, 268 U. S. 238, 251;
Reinecke vs. Trust Co., 278 U. S. 327, 348;
Bingham vs. United States, 296 U. S. 211, 218;
Industrial Trust Co. vs. U. S., 296 U. S. 220.

(It should be noted that in the third case above cited the Justices who did not concur in some of the conclusions stated in the majority opinion but concurred in the result, based their concurrence upon this ground).

That such serious doubts do exist in the present case is apparent from the following decisions of this Court.

In *Nichols vs. Coolidge* it was held that Section 402(c) of the Revenue Act of 1919 (sometimes called the Act of 1918), in so far as it required that there should be included in the gross estate the value of property transferred by a decedent prior to its passage, merely because the conveyance was to take effect in possession or enjoyment at or after his death, violated the Fifth Amendment.

Nichols vs. Coolidge, 274 U. S. 531, 542.

In three cases which were heard and decided at the same time, in 1935, the question was presented whether Section 302(d) of the Revenue Act of 1926 (which provided for the inclusion in gross estate of any interest in property of which the decedent had at any time made a transfer subject at the time of his death to change by him through exercise of a power, etc.), applied to transfers in trust made before its enactment. It was held that while as applied to transfers made in trust after its enactment it was not arbitrary or unreasonable, it would violate the Fifth Amendment if applied to transfers in trust made before its enactment without reservation of a power by the grantor to revoke, alter or amend. This was held, it should be noted, even in cases where the creator of the trust was the decedent.

Helvering vs. City Bank, 296 U. S. 85, 92;
Helvering vs. Helmholz, 296 U. S. 93, 97;
White vs. Poor, 296 U. S. 98, 102.

It should be noted that the Justices who concurred in the result in these cases concurred as to the unconstitutionality of the retroactive clause in the statute.

In the *Saltonstall* case the question was whether the State of Massachusetts could constitutionally subject to inheritance tax (by a statute so providing) property passing under a trust settlement made by a decedent in his lifetime, in which power to revoke or alter during the settlor's life, was reserved (no power of testamentary appointment was involved). It was held that the statute was constitutional as applied to a trust created (by the decedent) prior to its passage, and the case was distinguished from *Nichols vs. Coolidge* upon the ground that the Massachusetts statute in question

imposed a tax upon the takers' privilege of succession; not like the statute involved in *Nichols vs. Coolidge* (Federal Estate Tax), a tax upon the donor or his estate.

Saltonstall vs. Saltonstall, 276 U. S. 260.

These decisions therefore apparently leave the law applicable to the constitutionality of attempts by statute to tax transmissions occurring under trusts created prior to the statute about as follows: If such tax is a tax on the decedent or a tax on the decedent's estate, such as an estate tax is, then it is unconstitutional to include devolutions occurring under trusts created prior to the passage of such law. If on the other hand the tax in question is in the nature of an inheritance tax, upon the beneficiary's succession to the property in question, then the objection of unconstitutionality does not apply. Whether this Court should or would now overrule any of these decisions is a question which we do not think it necessary to argue in this case, which is concerned primarily with the construction of the statute. It is sufficient to show that serious constitutional questions are involved in Petitioner's contention.

In the present case it is clear that the law in question is an estate tax law. The primary liability is on the estate of the donee of the power.

R. J. Reynolds, the creator of the largest trust (according to our calculation over 90% of all of the property involved; for Petitioner's figures which indicate about 85%, see p. 27 of his brief), died in July, 1918, before the Estate Tax Law of 1919 was adopted. And while Mrs. Johnston's two smaller trusts were created after 1919, they were created before the entirely novel

attempt to tax such passages of title which is now attributed to the Act of 1926, was made, if ever made at all. If therefore Petitioner's contention as to the scope and effect of the change in Section 302(a) made in the 1926 law were correct, it would follow that by that Act Congress was attempting to impose an estate tax upon rights passing under trust settlements which were created prior to the enactment of such statute.

It is true that Judge Parker said in his opinion below (R. p. 46) that the question before the Court was not whether Congress had the power to tax, but whether it was intended to exercise that power; and that it might be assumed that Congress had such power. We think that what Judge Parker meant by this was that it might be assumed *argumenti gratia*. But in any case we submit that under the foregoing decisions there is serious doubt whether Congress (or a State) can impose by way of estate tax (as distinguished from an inheritance tax against the beneficiaries), a tax on account of the devolution of title under the terms of a trust created before such an attempt was made, and due to the non-exercise of a power of testamentary appointment by the decedent; especially when he never had the ability to exercise such power.

II.

THAT THE PRINCIPLE OF LYETH VS. HOEY, 305 U. S. 188, DOES NOT REQUIRE THAT ANY PART OF THE PROPERTY HELD IN THESE TRUSTS SHOULD BE INCLUDED IN DETERMINING ESTATE TAX, BECAUSE OF ANY DISPOSITION MADE OF IT IN PURSUANCE OF THE COMPROMISE MADE AND RATIFIED BY THE NORTH CAROLINA AND MARYLAND COURTS.

1. Difference between income tax (accruing on date of receipt) and estate tax (accruing on date of death), in this respect.

Lyeth vs. Hoey, 305 U. S. 188 (Cf. Magruder vs. Segebade, 94 F. (2d) 177), decided that amounts received in compromise of what would not have been taxable income if received, are not themselves taxable income. It is a fair inference from this that conversely amounts received in compromise of what would have been taxable income if received are taxable income. The incidence of tax in such cases is as of the time of receipt and the question in such cases is whether at such time of receipt it had the status of taxable income. "In the ordinary case a taxpayer who acquires the right to receive income is taxed when he receives it, regardless of the time when his right to receive payment accrued."

Helvering vs. Horst, 311 U. S. 112, 115.

No such income tax question arises in the present case, which involves estate tax; nor could it arise because the amounts received in settlement or compromise were received for claims which on no con-

ceivable determination could have constituted income.

But in dealing with Estate Tax there is a quite different situation. Estate Tax liability is determined as of the date of death of the decedent, and subsequent transactions among the parties interested or events do not affect the incidence of the tax, which has to be determined according to the then state of facts. Thus it has been held that the unexpected death of a life beneficiary, shortly after the testator's death and before estate tax return has been made, did not warrant valuing her life interest on the basis of such actual experience, instead of upon her probable life according to the tables at the time when the testator died, because estate tax is imposed upon the basis of the situation then existing, and not as modified by subsequent events.

> "The tax is on the act of the testator, not on the receipt of property by the legatees" (Citations).
>
> *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151.

Or as said by Justice Holmes in the earlier case deciding that for estate tax purposes the deduction for charitable bequests should be computed without any diminution on account of the tax itself:

> "It" (the estate tax) "comes into existence before and is independent of the receipt of the property by the legatee."
>
> *Edwards vs. Slocum*, 264 U. S. 61, 62.

It is true, due to the special wording of the section taxing powers of appointment if exercised, the property must actually pass, as the result of the exercise. But it is also necessary that the power of appointment

shall have been validly exercised, and such a subsequent compromise would not render unnecessary the determination of the question, was the power validly exercised.

The statute expressly requires both that the power be exercised, and as an additional requirement that the property pass as the result of such exercise. As said by this Court in the case affirming the necessity for the existence of this second requirement:

> "Analysis of this clause discloses three distinct requisites: (1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise."
>
> *Helvering vs. Grinnell*, 294 U. S. 153, 155.

And as said by this Court in *U. S. vs. Field* and repeated in *Crooks vs. Harrelson*, in construing another part of this same section:

> "These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause."
>
> *U. S. vs. Field*, 255 U. S. 257, 262 (1921); *Crooks vs. Harrelson*, 282 U. S. 55, 59 (1930).

Neither would a subsequent compromise prevent the property in the entire fund from having passed, within the meaning of sub-section (f), if it were found that the power had been validly exercised. Such a compromise presupposes a passage of title to all of the appointed

property of which the appointees surrender part to those who had asserted the claim that the appointment was not validly exercised. Unlike the appointees in the *Grinnell* case, *supra*, they would not have declined to accept the appointment so as to prevent its having taken effect, as the compromise presupposes acceptance.

Petitioner (p. 53) puts the supposed case that the compromise had taken the form of an agreement to probate and allow the New York will, with the brother and sisters paying over to the other interested parties a portion of the property which they would then have received under the exercise of the powers in the will, and says that had this been done it would plainly not have been the function of the Board of Tax Appeals to relieve the estate from tax, because under its own analysis of the facts and the local law the powers were not validly exercised, and that no different result should follow here because the compromise was carried out in a different form.

But if the will had been probated and sustained as a valid exercise of the power, and the compromise put in the form here suggested by Petitioner, we may well ask in return whether the Government would be satisfied with any determination that the amount of estate tax was reduced by the compromise and that the payments made by those who would then take outright under the exercise of the power, to the "other interested parties", of a portion of the property which the appointees so received under the exercise of the powers, should be considered as not having passed by exercise of the power.

If the rule of *Lyeth vs. Hoey* is applicable to such compromises, with the result that the gross estate of

the decedent is to be determined by such compromises, made long after the basic date to which estate tax is referable, then such appliction of the rule must "work both ways", whether for or against the Government (in *Lyeth vs. Hoey* it was applied for the benefit of the taxpayer); and it is obvious that the result of such compromises would be to reduce taxes in more cases than it would operate to increase them; because of the opportunity afforded to taxpayers to make and arrange compromises in such form as might be most beneficial to them, from the tax standpoint.

There have been several cases in the Circuit Courts of Appeal dealing with the application of the principle of *Lyeth vs. Hoey* to estate tax and other cases.

In *Robbins vs. Comm'r.* there had been, subsequent to the testator's death, a compromise of objections to probate of the will, allotting $250,000, or one-third of the estate to Amherst College, in pursuance of which the will had been admitted to probate with a direction that the estate be administered in accordance with the terms of the will as modified by the compromise agreement. The question was whether the amount so distributable to Amherst College should be allowed as a deduction under the clause providing for the deduction of charitable gifts.

The Court held that by the terms of the will itself there was no sufficiently definite or vested gift to Amherst College, to serve as a deduction, and discussing the decision in *Lyeth vs. Hoey,* said:

> "It may be that, by the reasoning of *Lyeth vs. Hoey,* 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119, 119 A. L. R. 410, whatever is received by Amherst under the compromise agreement would be considered as 'acquired by * * * bequest' within the

meaning of Section 22(b) (3), and thus exempt from income taxation. The fact that Amherst was named as a contingent legatee in the testator's will gave it a standing to participate in the compromise agreement. Perhaps 'acquired by * * * bequest' in Section 22(b) (3) may be read to mean acquired as a proximate result of the bequest to Amherst in the testator's will. It would not follow from this, however, that the gift which Amherst received under the compromise agreement should itself be regarded as a gift of the testator and a 'bequest' within the meaning of Section 303(a) (3). The purposes of the two sections of the Revenue Act are not identical. As we have pointed out, the estate tax is based upon the value of the interest which ceased at the time of the testator's death. 'Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries.' *Young Men's Christian Association v. Davis*, 264 U. S. 47, 50, 44 S. Ct. 291, 292, 68 L. Ed. 558."

And the opinion concludes by saying:

"Hence, it is clear that whatever rights Amherst College has now, come to it through the compromise agreement and not under the will of the testator. The compromise agreement is not the will of the testator. Obviously, to allow a deduction of the gift of $250,000 to Amherst College, or one-third of the principal of the trust fund, whichever is the lesser, upon the death of the survivor of Bertha Allen Logan and Louise Allen Atkins, is to allow a deduction not under the will of the testator but under the compromise agreement. This would not be a transfer tax on the property of the decedent at the date of his death.

It is not a deduction permissible under this statute."

Robbins vs. Comm'r, 111 F. 2d 828, 831-832 (C. C. A. 1st Circt. May 2, 1940).

White vs. Thomas was an income tax case, in which the taxpayer had received a sum in compromise of a suit against the decedent's estate based upon a claim that certain land had been given to him, prior to death, by the decedent. The taxpayer claimed that the amount received was received as "the proceeds of a gift," relying on *Lyeth vs. Hoey*. The Court held however that the principle of *Lyeth vs. Hoey* did not apply even in an income tax case, when the amount received in compromise was not a part of the thing claimed and therefore not of the same character for tax purposes as the claim which was compromised.

White vs. Thomas, 116 F. 2d 147 (5th Circt. Dec. 5, 1940);

Certiorari denied, 313 U. S. 581.

Housman vs. Comm'r. involved a claim for gift tax. A testator had left his residuary estate in trust for his wife for life with only a small provision for his sons. Many years later one of the sons demanded a third of the widow's income on the ground of an alleged constructive trust or understanding that the widow was to provide for him; and under her lawyer's advice she agreed to pay him $100,000 a year. A gift tax was assessed on the payments which she made him in 1933, which was resisted on the ground that the transaction did not constitute a gift.

The Court held that no constructive trust was sufficiently proved, and that the promise made by the widow did not impose an enforceable obligation, and that

therefore the payment was essentially donative in character. In reference to *Lyeth vs. Hoey*, which was relied upon, the Court said that the case did not apply "as the facts are quite different and the issue one of gift tax and not of income tax."

Housman vs. Comm'r, 105 F. 2d 973
(C. C. A. 2nd Circt., July 26, 1939);
Affirming 38 B. T. A. 1007;
Certiorari denied, 309 U. S. 656.

In an estate tax case in the First Circuit, the principal question involved was whether decedent's will operated as an execution of his general power of appointment over two trust funds; the question depending on whether a residuary clause operated as an exercise of the power, and this depending in turn on whether the law of Massachusetts or the law of California applied. It was held that Massachusetts law governed and that the power was therefore exercised.

The further question arose out of the fact that in the settlement of the estate the question whether the powers had been exercised or not had been settled by an agreement between the interested parties; and the second contention of the Executor was that in any event only so much of the trust fund should be taxed as was recognized by this settlement agreement as having been appointed.

The Court held, however, that:

"The agreement which the parties made in settlement of the controversy, does not affect the rights of the Government under the tax statute."

Old Colony Trust Co. vs. Comm'r, (1934)
73 F. 2d, 970, 971;
Affirming *Vredenburg Minot Estate*, 29 B.
T. A. 677.

Sage vs. Comm'r was a case involving the construction and application of the section of the law relating to the deductibility of gifts for charitable purposes, in determining estate tax. This subsection (Act of 1926, Section 303(a)(3); now Section 811(d) of the Internal Revenue Code) provides for the deduction of the amount of all charitable gifts made by will or by transfer, with the further qualification that such deductions are to be allowed "but only if such contributions or gifts are to be used * * * exclusively for religious, charitable, etc. purposes." Such deduction is therefore subject to two requirements; viz, there must be such a gift made by the will, etc.; and, secondly, as an additional requirement, that the gift is to be used by the charity exclusively for charitable purposes. If therefore the charity sees fit to appropriate part of the gift to a compromise with contesting heirs, then the gist of the decision is that the part so used is not applied to charitable purposes.

In so holding that the amount of a charitable deduction was reduced by the charity surrendering part of what was bequeathed it by the will, the Court expressly differentiated the case from one in which the amount of the gross estate was involved and said:

> "Undeniably, the estate subject to tax is the property which passes from a decedent at death. The estate tax is a tax on the transmission and not on the succession. Knowlton vs. Moore, 178 U. S. 41, 48, 49. The decedent's gross estate is therefore to be determined as of the date of his death. Ithaca Trust Co. v. United States, 279 U. S. 151, 155. But, while a decedent's gross estate is fixed as of the date of his death, deductions claimed in determining the net estate subject to

tax may not be ascertainable or even accrue until the happening of events subsequent to death. Such is the case with respect to administration expenses, which are of course an allowable deduction. It is also true with respect to deductions for conditional charitable bequests which cannot be measured until the happening of some subsequent event, or in cases where bequests to charity are in whole or in part diverted to a use for which the bequest would not be deductible had it been directly so bequeathed by the decedent. This precise situation is provided for by Treasury regulation which appropriately effectuates the administration of the cognate statutory provision. The regulation is peculiarly pertinent to the facts in the instant case."

Sage vs. Comm'r., 122 F. 2d 480 (3rd Circ.) (June 27, 1941);
Certiorari denied January 5, 1942.

Thompson's Estate vs. Comm'r., is a case dealing with the same situation as the *Sage* case, viz, whether the full amount devised to chairty should be allowed as a deduction when part of the charitable gift is surrendered in compromise by the charities.

Thompson's Estate vs. Comm'r., 123 F. 2d, 816, (2nd Circ., Nov. 17, 1941).

The other cases cited by Petitioner in support of his contention, are not, it is submitted, in point.

Benfield vs. U. S. was an income tax case, in which the question was wether an annual payment to be made to testator's widow was an annuity charged upon both income and principal of the trust, and therefore not

subject to income tax as her income, and not deductible by the trustee in its returns of income taxable to the trust; or whether it was deductible by the trustees (executors) as distributed income.

It was held that even if the will were held not to charge the allowance on principal, the heirs had by agreement made the payments to her such a charge. Being an income tax case, and the question being one of the status of her payments at the time when they were made to her, the principle of *Lyeth vs. Hoey* might have been applicable. The Court however, found that the additional amounts allowed her by the agreement of the heirs constituted merely gifts, and were therefore not taxable to her as income.

Benfield vs. U. S., 27 F. S. 56, 63 (Court of Claims, April, 1939).

Markwell's Estate vs. Comm'r. was a case in which the deductibility of a claim against the testator's estate was involved. A daughter had asserted a claim, after his death, to one-half of the estate, based upon an alleged contract to provide for her made many years before. The probate court had allowed her claim in the amount of $138,220, which the executor claimed should be deducted, for estate tax purposes, from the estate. The question was whether her claim was supported by fair and adequate consideration in money or money's worth, under Section 303 of the Act of 1926. The Court held that it was not, and merely said, in reference to *Lyeth vs. Hoey*, that if the Wisconsin decree were considered as merely entitling the claimant to a one-half distribution of the estate of decedent, there was no question as to the applicability of the estate tax laws; evidently meaning that the share

would of course be includible for estate tax purposes on that supposition.

Markwell's Est. vs. Comm'r., 112 F. 2d, 253, 255 (C. C. A. 7th Circ., May 22, 1940).

Even therefore if the sole consideration for the compromise had been the attempted appointment by the invalid New York will, it is plain, it is submitted, that tax liability under Sub-section (f) would be determined by the amount of property validly appointed, and not by such amount as might be allowed to the appointees, in a compromise. And any application of Petitioner's theory to a case in which any possible right of the attempted appointees was only one of the considerations for the compromise, presents peculiar difficulties which reflect upon the reasonableness of the whole proposition.

2. That the compromise was made and effected by the judgments of the North Carolina Court and the Maryland Court, and that both Courts in ratifying the compromise expressly decided that the attempted appointment was invalid.

How can it be said that any amounts allotted in the settlement made by the judgment, were given in compromise of claims of the brother and sisters under the New York will, when the North Carolina Court which made the compromise effective, expressly declared and decided that the attempted appointment was totally invalid; and the Maryland Court did the same?

The compromise involved the rights not only of minors, but of possibly unborn future beneficiaries interested under the limitations in the wills, and was in

substance a compromise or settlement which could only be made by the Court.

The judgment effecting the compromise, which was affirmed on appeal by the Supreme Court of North Carolina, contains the following finding:

> "That Zachary Smith Reynolds' twenty-first birthday would have occurred on November 4, 1932; that at the time of the execution of the instrument referred to in paragraph 49 the general and testamentary guardians of the said Zachary Smith Reynolds were his uncle, W. N. Reynolds, and R. E. Lasater, who were domiciled in and residents of Forsyth County in the State of North Carolina, and they continued to act and were so domiciled until the date of the death of Zachary Smith Reynolds on July 6, 1932; that the domicile of Zachary Smith Reynolds at the date of his death and at the date of the execution of the instrument referred to in Paragraph 49 was in North Carolina; that a minor is without power to establish a domicile of choice, and that marriage does not change his status; that even if Zachary Smith Reynolds had the power to adopt a domicile of choice and to execute a will in the State of New York at the date of his death, which would affect his personal estate absolutely owned, such a will would not exercise the powers of appointment under the will of his father, R. J. Reynolds, and the will and deed of his mother, Katherine S. Johnston" (R. p. 89).
>
> *Reynolds vs. Reynolds*, 208 N. C. 578, at p. 592.

It should be noted that the pecuniary legatees (by appointment) named in the New York will were par-

ties to the case and their rights were before the Court for determination.

Rec. N. C. Proceedings, pp. 82, 635.[6]

And the third paragraph of the decree of the Maryland Court affirming the compromise is as follows:

> "3. That the Defendants who are named as legatees in the paper writing heretofore filed for probate in the office of the Surrogate of New York County, in the State of New York, as an alleged last will and testament of Zachary Smith Reynolds, deceased, an authenticated copy of which was filed with the Plaintiff's Bill of Complaint as Plaintiff's Exhibit H and was filed as part of the testimony in this cause, are not entitled to receive any allowance, share or payment out of either the principal or income of any of said trust estates, now in the hands of the Plaintiff as trustee; because said paper writing or alleged will was not effective or operative to dispose of or affect any of the property or estate held by the Plaintiff as Trustee under any of said instruments, but was altogether void and without effect as an exercise of any power of appointment or disposition which the said Zachary Smith Reynolds would have possessed or had, if he had attained lawful age at the time of his death; and therefore no allowance or payment shall be made to anyone as claiming

[6] The exhibit here referred to is the printed volume containing the entire record of proceedings in the North Carolina case, which was filed by stipulation (R. p. 33) in the case. Only that part of it which comprises the findings and opinion of the Supreme Court will be found in the printed record in this case (R. p. 76, etc.); but it was stipulated (R. p. 33) that reference may be made to any portion of the transcript of record which is not included in such present printed record.

under said alleged will, out of the principal or income of the estate and property held by the Plaintiff as Trustee under any of the settlements referred to in said Bill of Complaint'' (R. p. 51).

The legatees under the New York will and the executor named therein were parties to this suit and their rights were before the court for adjudication.

Rec. N. C. Proceedings, p. 520, etc.;
Stipulation, R. p. 33.

The very courts therefore which effected the compromise by their judgments, expressly declared and decided that the attempted appointment was invalid.

3. That the attempted New York will was relatively not of importance as a basis for the compromise.

The standing of the New York will as a basis for recovery or compromise had been quite effectively disposed of by the North Carolina Supreme Court on the appeal in the Cabarrus County Guardianship case.

The Cabarrus County case was, it may be mentioned, a bitterly contested case, in which no concessions were made upon either side. It was a controversy between two guardians, one of whom was in favor of contesting the decree by which their ward had been excluded from further participation in these estates; and the other was opposed to such action. If the attempted will of Zachary Smith Reynolds were a valid apointment, then manifestly their ward could gain nothing by the proposed litigation, and might even incur the risk of losing what had already been set aside for her.

The principal opinion in the case (what is called the "main opinion" in the opinion in the later case; R. pp. 106, 109) was given by Judge Clarkson; and that part of it which deals with the invalidity of the attempted appointment ("the alleged will of Zachary Smith Reynolds appears to be inoperative and void," etc.) is quoted in full in the Board's opinion in this case (R. p. 18; it will be found of course in the reported case); and we will not repeat it in this brief. Moreover, the statements in the opinion, in this connection, are so manifestly correct that the invalidity of the attempted appointment was perfectly apparent, even if the Court had said nothing upon that subject.

It is suggested by Petitioner (p. 55 of Brief) that these statements represent merely the opinion of one of the five Judges who sat, because one concurred in the result, without filing an opinion, and two others filed short separate opinions concurring, while one dissented and agreed with the Court below.

Judge Stacy's concurring opinion is merely a brief summary of the grounds for reversing, and indicates no possible disagreement with the propositions laid down in the principal opinion. Judge Adams filed no opinion. It is true that Judge Brogden in his concurring opinion uses the phrase that "the New York will was not upon the lap of the Chancellor." He also, however, expresses no dissent from the self-evident propositions of law in reference to the attempted New York will, as laid down in the principal opinion.

Guardianship of Anne Cannon Reynolds II, 206 N. C. 276.

As further indicating that the New York will was relatively unimportant in the compromise, it should be

noted that in the petition submitting the proposed compromise for the approval of the Court, in which the several contentions of the different parties to the case are quite fully set forth, and the claims of the several parties stated, there is no mention of any claim under the New York will as constituting a valid appointment.

Rec. N. C. Proceedings, p. 147, etc.

On the other hand the validity of the judgment barring the Cannon child and the validity of the Reno divorce were the conditions which actually counted in the settlement. Whatever may be now suggested as to what would have been the decision upon these two questions, they presented at the time most serious questions. The judgment excluding the Cannon child was considered valid and proper not only by the prominent North Carolina lawyers who represented the parties at the time, but the Judge below in the Cabarrus County case thought it should not be attacked, and so decided or decreed and one of the Supreme Court Judges who sat on the appeal agreed with the Judge below in this respect.

What the situation before the Court and parties as to the question of the validity of the Reno divorce was, when the settlement was made, is quite apparent from the Record of that suit, which is included in full in the North Carolina Record (Rec. N. C. Proceedings, pp. 540-563); and from the account of how the divorce was obtained given by the lady chiefly concerned (do pp. 188-190), by her father (do p. 611) and by her nurse (do p. 651); all of which were before the Court when it entered the judgment effecting the settlement of these questions.

On the necessity of a bona fide domicile to the validity of a foreign divorce see:

Restatement of Conflict of Laws (Am. Law Inst.), Sec. 111, etc.;
Note, 32 A. L. R. 677;
Note, 105 A. L. R. 817.

That Zachary Smith Reynolds and those claiming under him may have been estopped by his participation, while an infant, in the case (*Restatement of Conflict of Laws*, Sec. 112), did not help those who were interested in upholding the validity of the divorce, in the litigation which resulted in the compromise. Those who were attacking the validity of the divorce, did not claim under Zachary Smith Reynolds; but under the limitations in his father's and mother's will and deed.

We do not deny that any possible claim under the New York will was included in the settlement and to that extent may be considered as one of the contributing causes, and it is true that on appeal from the judgment affirming the settlement which was resisted by some of the parties to the cause, the North Carolina Supreme Court referred to all of the matters in controversy, including the New York will, as presenting serious questions which justified the making of such a compromise. We submit however that any claims under the New York will were relatively unimportant when compared with the other elements of the controversy.

4. That the thirty-seven and a half per cent compromise share in the R. J. Reynolds Estate, of which the surviving brothers and sisters were beneficiaries (and which it is now claimed was allotted in part in satisfaction of their

claims under the New York will), was allotted to be added to the shares already held in trust for them under their father's will; that is, as it would have pased under the limitations of his will in default of appointment and issue; and hence could not have been allotted in whole or in part in satisfaction of any claim under the New York will, which would have appointed the property to his brother and sisters absolutely.

It should be further noted that the thirty-seven and a half per cent share in the R. J. Reynolds estate now claimed to have been given, in whole or in part, in compromise of the New York will, was allotted to be added to the shares already held in trust for the brother and sisters under their father's will, and subject to its limitations over in case of death under twenty-eight (R. pp. 99-100); as it would have gone if Zachary Smith Reynolds had died without exercising his power and without issue, under the terms of his father's will (R. p. 61). If they had taken any share in his estate under the New York will, it would have been as outright devisees.

Manifestly therefore the allottment of this thirty-seven and a half per cent, which it is now claimed should be apportioned as partly due to the attempted New York will and partly to the other questions in dispute, could not have been made in consideration of the attempted appointment. (Compare Judge Parker's opinion, R. p. 52.)

5. That the findings of the Board of Tax Appeals are as full and specific as the nature of the case admits of; and that to remand the case to the Board for a finding of to what proportion the attempted appointment by the New

York will figured in the compromise finally arrived at, would require of the Board a task impossible of execution.

As the compromise and what might be called the negotiations leading up to it, were all matters of record the whole course of which fully appears in the transcript of the North Carolina record, and as all of these facts are found in great detail by the Board in its opinion, including findings of the questions which arose prior to the compromise, given as the Board says for the purpose of "presenting factually the state of litigation in which the property was involved" (R. p. 9), it is difficult to see what further evidence could be adduced or offered bearing upon such a question. The only conceivable additional evidence would be to call the parties who approved the compromise, or their attorneys, and ask them to what per cent any claim under the New York will figured in their minds in making the compromise. Such evidence would not we submit be relevant or admissible; nor could any more precise answer to it be given, than is indicated by the record of proceedings in the North Carolina case.

Lyeth vs. Hoey was decided several months before the first hearing of this case by the Board of Tax Appeals, and as shown by the opinion of the Board in the present case, Petitioner's claim that some part of the estate should have been treated as passing by appointment, because of the compromise, was asserted at the first hearing below (unlike his present claim as to the taxability of unexercised powers of appointment, which was only asserted on appeal). Petitioner had of course full opportunity to adduce any evidence which he might think relevant upon this question, and might have asked the Board for a specific finding of the per cent or proportion which the New York will of Zachary

Smith Reynolds contributed to the settlement (if any such finding were possible). To remand this case, which has now been pending for over four years, for the taking of additional evidence and a finding by the Board of what the "proportionate contribution" of the claims involved in the settlement, to the compromise or final settlement was, would be to require of the Board an impossible task, and would not it is submitted promote the interests of justice.

CONCLUSION.

In conclusion therefore it is submitted that neither of the two claims now asserted by the Petitioner are well founded; and that the decision of the Circuit Court of Appeals should therefore be affirmed.

Respectfully submitted,

CHARLES McH. HOWARD,

Attorney for Respondents.

March, 1942.

p. 6

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1941.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
Safe Deposit and Trust Company of Baltimore, Trustee Under Wills of R. J. Reynolds and Katherine S. Johnston, etc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 13, 1942.]

Mr. Justice Black delivered the opinion of the Court.

Because of the importance in the administration of the Federal Estate Tax of the questions involved, we granted certiorari to review the judgment of the Circuit Court of Appeals, 121 F. 2d 307, affirming a decision of the Board of Tax Appeals, 42 B. T. A. 145.

Zachary Smith Reynolds, age 20, died on July 6, 1932. At the time, he was beneficiary of three trusts: one created by his father's will in 1918, one by deed executed by his mother in 1923, and one created by his mother's will in 1924. From his father's trust, the decedent was to receive only a portion of the income prior to his twenty-eighth birthday, at which time, if living he was to become the outright owner of the trust property and all accumulated income. His mother's trusts directed that he enjoy the income for life, subject to certain restrictions before he reached the age of 28. Each of the trusts gave the decedent a general testamentary power of appointment over the trust property; in default of exercise of the power the properties were to go to his descendants, or if he had none, to his brother and sisters and their issue *per stirpes*.

The Commissioner included all the trust property within the decedent's gross estate for the purpose of computing the Federal Estate Tax. The Board of Tax Appeals and the Circuit Court of Appeals, however, held that no part of the trust property should have been included.

I.

The case presents two questions, the first of which is whether the decedent at the time of his death had by virtue of his general powers of appointment, even if never exercised, such an interest in the trust property as to require its inclusion in his gross estate under Section 302(a) of the Revenue Act of 1926, 44 Stat. 9, 70. This section provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;"

The government argues that at the time of his death the decedent had an "interest" in the trust properties that should have been included in his gross estate, because he, to the exclusion of all other persons, could enjoy the income from them; would have received the corpus of one trust upon reaching the age of 28; and could alone decide to whom the benefits of all the trusts would pass at his death. These rights, it is said, were attributes of ownership substantially equivalent to a fee simple title, subject only to specified restrictions on alienation and the use of income. The respondents deny that the rights of the decedent with respect to any of the three trusts were substantially equivalent to ownership in fee, emphasizing the practical importance of the restrictions on alienation and the use of income, and arguing further that the decedent never actually had the capacity to make an effective testamentary disposition of the property because he died before reaching his majority.

We find it unnecessary to decide between these conflicting contentions on the economic equivalence of the decedent's rights and complete ownership.[1] For even if we assume with the government that the restrictions upon the decedent's use and enjoyment of the trust properties may be dismissed as negligible and that he had the capacity to exercise a testamentary power of appointment, the question still remains: Did the decedent have "at the time of his death" such an "interest" as Congress intended to be included

[1] In declining to pass upon this issue, we do not reject the principle we have often recognized that the realities of the taxpayer's economic interest rather than the niceties of the conveyancer's art should determine the power to tax. See Curry v. McCanless, 307 U. S. 357, 371, and cases there cited. Nor do we deny the relevance of this principle as a guide to statutory interpretation where, unlike here, the language of a statute and its statutory history do not afford more specific indications of legislative intent. Helvering v. Clifford, 309 U. S. 331.

in a decedent's gross estate under Section 302(a) of the Revenue Act of 1926? It is not contended that the benefits during life which the trusts provided for the decedent, terminating as they did at his death, made the trust properties part of his gross estate under the statute. And viewing Section 302(a) in its background of legislative, judicial, and administrative history, we cannot reach the conclusion that the words "interest . . . . of the decedent at the time of his death" were intended by Congress to include property subject to a general testamentary power of appointment unexercised by the decedent.

The forerunner of Section 302(a) of the Revenue Act of 1926 was Section 202(a) of the Revenue Act of 1916, 39 Stat. 777. In *United States* v. *Field*, 255 U. S. 257, this Court held that property passing under a general power of appointment *exercised* by a decedent was not such an "interest" of the decedent as the 1916 Act brought within the decedent's gross estate. While the holding was limited to *exercised* powers of appointment, the approach of the Court, the authorities cited, and certain explicit statements[2] in the opinion left little doubt that the Court regarded property subject to *unexercised* general powers of appointment as similarly beyond the scope of the statutory phrase "interest of the decedent."[3]

After the *Field* case, the provision it passed upon was reenacted without change in the Revenue Act of 1921 (Section 402(a), 42 Stat. 278) and in the Revenue Act of 1924 (Section 302(a), 43 Stat. 304). If the implications of the *Field* opinion with respect to unexercised powers had been considered contrary to the intendment of the words "interest of the decedent" it is reasonable to suppose that Congress would have added some clarifying amendment.

If the counterparts in the earlier Acts of Section 302(a) of the Revenue Act of 1926 did not require the inclusion of property

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[2] *E. g.*: "But the existence of the power does not of itself vest any estate in the donee." (p. 263.)

"If there be no appointment, it [the property subject to the power] goes according to the disposition of the donor." (p. 264.)

" . . . the interest in question [was] not . . . property of Mrs. Field at her death." (p. 264.)

[3] In Burnet v. Guggenheim, 288 U. S. 280, 288, this Court stated: "*United States* v. *Field* . . . holds that under the Revenue Act of 1916 . . . the subject of a power created by another is not a part of the estate of the decedent to whom the power was committed." It is to be noted that no distinction was recognized between exercised and unexercised powers under the rule of the Field case.

subject to an unexercised general testamentary power of appointment within the decedent's gross estate, there is no basis for concluding that the amendment of 1926 changed the act in this respect. Prior to 1926 an "interest of the decedent" was to be included in his gross estate only if subject "after his death . . . to the payment of the charges against his estate and the expenses of its administration and . . . subject to distribution as part of his estate." In the 1926 Act this qualification was abandoned. In the report accompanying the bill which embodied this change, the House Committee on Ways and Means stated only that "In the interest of certainty it is recommended that the limiting language . . . ". shall be eliminated in the proposed bill, so that the gross estate shall include the entire interest of the decedent at the time of his death in all the property."[4] Nothing in the report suggested that the change was intended to have any relevance to powers of appointment, and no such intention can reasonably be inferred from the amended section itself. It is noteworthy that the regulations of the Bureau of Internal Revenue issued after passage of the 1926 Act contain no indication that the Treasury Department regarded the amendment as affecting unexercised powers of appointment. On the other hand, the article pertaining to powers of appointment was reincorporated in the 1926 regulations with the same content, so far as here relevant, as the corresponding article in the last regulations issued prior to the 1926 Act.[5]

When it was held in the *Field* case that property subject to an *exercised* general testamentary power of appointment was not to be included in the decedent's gross estate under the Revenue Act of 1916, this Court referred to an amendment passed in 1919 which specifically declared property passing under an *exercised* general testamentary power to be part of the decedent's gross estate. The passage of this amendment, said the Court, "indicates that Congress was at least doubtful whether the previous act included property passing by appointment."[6] In the face of such doubts, which cannot reasonably be supposed to have been less than doubts with respect to *unexercised* powers, Congress nevertheless specified only that property subject to *exercised* powers should be included. From

[4] House Report No. 1, 69th Cong., 1st Sess., 15.

[5] Article 24 of Treasury Regulations 70 (1926 ed.) under the Revenue Act of 1926; Article 24 of Treasury Regulations 68 (1924 ed.) under the Revenue Act of 1924.

[6] United States v. Field, *supra*, 265.

this deliberate singling out of *exercised* powers alone, without the corroboration of the other matters we have discussed, a Congressional intent to treat *unexercised* powers otherwise can be deduced. At the least, Section 302(f) of the 1926 Act,[7] the counterpart of the 1919 amendment referred to in the *Field* case, represents a course of action followed by Congress since 1919 entirely consistent with a purpose to exclude from decedents' gross estates property subject to unexercised general testamentary powers of appointment.

In no judicial opinion brought to our attention has it been held that the gross estate of a decedent includes, for purposes of the Federal Estate Tax, property subject to an unexercised general power. On the contrary, as the court below points out, "the courts have been at pains to consider whether property passed under a general power or not so as to be taxable under Section 302(f), a consideration which would have been absolutely unnecessary if the estate were taxable under 302(a) because of the mere existence of a general power whether exercised or not."[8] 121 F. 2d 307, 312. In addition, the uniform administrative practice until this case arose appears to have placed an interpretation upon the Federal Estate Tax contrary to that the government now urges. No regulations issued under the several revenue acts, including those in effect at the time this suit was initiated, prescribe that property subject to an unexercised general testamentary power of appointment should be included in a decedent's gross estate. Because of the combined effect of all of these circumstances, we believe that a departure from the long-standing, generally accepted[9] construction of Section 302(a), now contested for the first time by the government, would override the best indications we have of Congressional intent.

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[7] "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth;" 44 Stat. 9, 70-71.

[8] See, *e. g.*, Helvering v. Grinnell, 294 U. S. 153; Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. 2d 758.

[9] See I Paul, Federal Estate and Gift Taxation 425: "As long as there is no actual or constructive exercise of the power, there can be no tax under the present statute".

II.

The second question is the treatment to be given, under Section 302(f) of the Revenue Act of 1926, to a share of the trust property passing to the decedent's brother and sisters as a result of a compromise settlement with other claimants. Should that share be included in whole or in part within the decedent's gross estate as "property passing under a general power of appointment exercised by the decedent . . . by will"?

The claim of the brother and sisters was based upon: (1) a purported exercise of the power of appointment in their favor by the decedent in a will he executed in New York, and in the alternative, (2) their right to take in default of appointment under the terms of the trusts. Each of the two children of the decedent (1) denied the validity of the New York will and (2) challenging the right of the brother and sisters to take in default, independently asserted his own. These issues, complicated by many other factors which it is unnecessary here to discuss, were never finally resolved by judicial decision, although there had been much litigation involving them in the North Carolina courts. Eventually, the several claimants agreed to a compromise under which 37½% of the trust property went to the brother and sisters. The compromise was confirmed by a judgment of the North Carolina Superior Court and this judgment was affirmed by the North Carolina Supreme Court. 208 N. C. 57[illegible]8

The government contends that a portion of the share received by the brother and sisters reflects recognition by the other claimants as well as by the North Carolina courts of the assertion that the power of appointment was validly exercised; and that under the doctrine approved by this Court in *Lyeth* v. *Hoey*, 305 U. S. 188, that portion must be treated as though it actually passed pursuant to an effective exercise of the power.

The *Lyeth* case, like the one now before us, came to this Court after a compromise settlement. An heir of the decedent had contested the validity of the decedent's will in which no provision had been made for him. The heir and the devisees and legatees under the will entered into a compromise providing that the will be probated and that a specific sum be paid to the heir. We held that the money the heir received pursuant to the compromise should be treated, with respect to his tax liability under the federal income

tax statute,[10] as if acquired "by inheritance" for the reason that it was possible for him to receive it only "because of his standing as an heir and of his claim in that capacity."[11]

The claim of the decedent's brother and sisters here, so far as based on the validity of the purported appointment, had its roots, like the claimed invalidity of the will in the *Lyeth* case, in an issue never decided in litigation. If it had been litigated to final judgment by a competent tribunal and the brother and sisters had succeeded in establishing the validity of the exercise of the power, the inclusion in the decedent's gross estate of what they would have received as appointees, pursuant to Section 302(f), could not seriously be questioned. In the *Lyeth* case we said that "the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound."[12] There is no less reason for the same conclusion here.

The respondents contend that the principle of the *Lyeth* case, announced by the Court with respect to income tax liability, should not be controlling where, as here, the question is one of estate tax liability. It is urged that taxes should not be influenced by what occurs after the taxable event; that it is reasonable to consider a compromise *preceding* the receipt of income in connection with an income tax; but that a compromise occurring *after* the decedent's death, which is the "taxable event" under an estate tax, should not be considered. Whatever may be the general rule in this respect,[13] this Court has clearly recognized, in *Helvering* v. *Grinnell*, 294 U. S. 153, that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under Section 302(f). In that case the decedent had exercised a general testamentary power of appointment, an act which under Section 302(f) brings the property subject to the power within the gross estate. The subsequent renouncement by the appointees of the right to receive by appointment and their election to take as remaindermen in default of appointment were held by this Court to

[10] Section 22(b)(3) of the Revenue Act of 1932, 47 Stat. 178, under which the Lyeth case arose, exempted from the income tax the "value of property acquired . . . by inheritance . . . ."

[11] Lyeth v. Hoey, *supra*, 196.

[12] *Id.*

[13] See Ithaca Trust Co. v. United States, 279 U. S. 151, 155.

place the property subject to the power outside the scope of Section 302(f).

The respondents further contend that judicial determinations having been made in the state courts that the attempted appointment was invalid, the share of the brother and sisters in the compromise reflects only their alternative claim to the trust property. While there are explicit statements in the opinion of the North Carolina Supreme Court that the attempted appointment was invalid, these statements must be regarded as superseded by the opinion which the North Carolina Supreme Court, whose determination constituted the final approval of the compromise, rendered on appeal. For, in the course of that opinion the Supreme Court gave clear recognition to the alleged validity of the decedent's attempted appointment as a basis of the claim the brother and sisters asserted. The court stated (208 N. C. 578, 618):

"Serious and grave questions of law and facts were raised. The judgment sets them out and we refer to same, all troublesome, but we will consider one for example: The validity and effect of the alleged will executed in New York by Zachary Smith Reynolds, as a basis of the offer of the brother and sisters of Zachary Smith Reynolds."

Inconsistent statements made in the course of a decree issued by the Circuit Court of Baltimore, Maryland, cannot be regarded as overcoming the force of the foregoing, since the decree purported only to authorize and direct the Maryland trustee to divide the trust property in accordance with the compromise as approved in North Carolina.

How much, if any, of the 37½% going to the decedent's brother and sisters should be imputed to the claim based on the attempted exercise of the power of appointment and how much to their alternative claim we do not decide. In remanding this case to the Board of Tax Appeals for a determination of this issue, we recognize that a decision must necessarily be an approximation derived from the evaluation of elements not easily measured. In matters so practical as the administration of tax laws and in the decision of problems connected with them, a high degree of precision is often impossible to achieve. But it is far better to make such a rough estimate as the data will permit than completely to ignore the realities of the compromise because of the difficulties of evaluation.[14]

[14] Cf. United States v. Ludey, 274 U. S. 295, 302.

The judgment of the Circuit Court of Appeals is reversed with directions to remand to the Board of Tax Appeals for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1941.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
Safe Deposit and Trust Company of Baltimore, Trustee under Wills of R. J. Reynolds and Katharine S. Johnston, etc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 13, 1942.]

The Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Byrnes concur in the opinion of the court upon the first question decided. They dissent from the decision of the second question. They are of opinion that that question should be answered in favor of the respondents on the authority of *Helvering* v. *Grinnell*, 294 U. S. 153, and that *Lyeth* v. *Hoey*, 305 U. S. 188, furnishes no support for a different answer.

The estate in question is not that of the decedent. The property is a portion of the estates of his mother and father. It is conceded that no part of either estate passed by virtue of the execution by the decedent of the powers of appointment with which he was clothed. The property passed under the deed and wills of his parents, and that passage was the taxable event. If he had voluntarily refrained from exercising the power, his estate would not have been liable to pay an estate tax for the property would then have passed from the estates of his mother and father to the distributees. But it has been decided by competent tribunals that he did not exercise the power although he attempted so to do; and, in any case there is no determination here, or elsewhere, that the power was ever exercised. This being so, the question is whether anything passed from him to his relatives under the intestate law at his death. It is plain that nothing did so pass.

In *Helvering* v. *Grinnell, supra*, the decedent exercised the power but the appointees, as was their right under state law, elected not to take under the appointment but to take as remaindermen di-

rectly from the estate of the creator of the power, and it was held that § 302 could not be invoked to impose a tax upon the estate of the decedent. It was there said:

"The crucial words are 'property passing under a general power of appointment exercised by the decedent by will.' Analysis of this clause discloses three distinct requisites—(1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise. Clearly, the general power existed and was exercised; and this is not disputed. But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the property, it could not well be said that the property had passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title, the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative."

Lyeth v. *Hoey, supra,* decides nothing to the contrary. In that case the property in question was the property of the decedent himself. He disposed of it by will. The will was contested. The contest was compromised and, as a result, those who were his heirs at law received at least a portion of that which they would have received as his heirs in the absence of a will. Thus, as a result of the compromise, property did pass from the decedent to his heirs at law and it was held that, as they were his heirs, they took by inheritance in contemplation of the Revenue Act. Here nothing passed by virtue of the exercise of the power and no portion of the decedent's estate passed under the law of descent and distribution, or as property would have passed under that law from the decedent to the beneficiaries of the compromise.

We are at a loss to understand how the Board of Tax Appeals can be permitted to find that any taxable transfer occurred within the meaning of § 302 of the Revenue Act of 1926. Moreover, the compromise was motivated by considerations other than the invalidity of the power, for the claims of the decedent's children had a large influence in bringing it about. We cannot perceive how the Board can calculate the relative weight of these conflicting claims and thus assess as taxable an apportioned part of the total amount the decedent's collateral relatives received, and thus determine what part of the property passed under the power and what part did not.